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No. _____

IN THE

Supreme Court Of The United States

October Term, 1985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of Civil Appeals of Alabama
and the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Alabama can ignore the Equal Protection Clause of the Fourteenth Amendment by imposing an ad valorem tax on petroleum pipeline common carriers at a rate 50 percent higher than the tax on competing common carriers.

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On Appeal from the Court of Civil Appeals of Alabama
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JURISDICTIONAL STATEMENT

Appellant, Colonial Pipeline Company ("Colonial"), appeals from the final judgment of the Court of Civil Appeals of Alabama dated January 25, 1984, and the order of the Supreme Court of Alabama dated May 10, 1985, which quashed Colonial's writ of certiorari to the Court of Civil Appeals as improvidently granted. The Court of Civil Appeals held that Alabama's ad valorem tax scheme as applied to petroleum pipeline common carriers, such as Colonial, does not violate the Fourteenth Amendment to the Constitution of the United States.[1]

[1]Pursuant to Rule 28.1 of the Rules of this Court, the corporate parents, subsidiaries, and affiliates of appellant were provided to this Court in a letter from Cathy S. Wright to Ed Turner dated July 23, 1985.

OPINIONS BELOW

The order and three-justice dissent of the Supreme Court of Alabama, which is not yet officially reported, appears in the Appendix at A-1 to A-17. The opinion of the Court of Civil Appeals of Alabama, which is also unreported, appears in the Appendix at A-19 to A-26. The unreported opinion of the Circuit Court of Montgomery County, Alabama appears in the Appendix at A-30 to A-50.

JURISDICTION

The Court of Civil Appeals of Alabama entered a final judgment upholding the constitutionality of Alabama's ad valorem tax scheme as applied to Colonial on January 10, 1984. On February 29, 1984, the Court of Civil Appeals denied Colonial's application for rehearing. On May 4, 1984, the Supreme Court of Alabama granted Colonial's petition for a writ of certiorari to the Court of Civil Appeals. The Supreme Court of Alabama, on May 10, 1985, without a written opinion, quashed the writ as improvidently granted.[2]

A notice of appeal to this Court was duly filed in the Supreme Court of Alabama and in the Court of Civil Appeals of Alabama on July 18, 1985. By order dated July 25, 1985, Justice Powell extended the time for docketing an appeal in this case to and including September 9, 1985. This appeal is being docketed within that time. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant provisions of the Fourteenth Amendment to the United States Constitution, the Constitution of the State of Alabama, and the Alabama Code are reproduced in the Appendix at A-55 to A-72.

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[2]Under Rule 39 (j), Ala. R. App. P., no application for rehearing is permitted in the Alabama Supreme Court if the petition for certiorari is denied. In applying this rule, the Alabama Supreme Court does not permit applications for rehearing if the writ of certiorari is quashed as improvidently granted.

STATEMENT

Since 1978, the State of Alabama has discriminated against petroleum pipeline common carriers, such as Colonial, by taxing their property at a ratio of 30 percent of market value rather than the 20 percent of market value exacted from competing common carriers. *See* Appendix ("App.") at A-27 to A-28. Colonial thus pays ad valorem taxes at a rate 50 percent higher than that imposed on competing common carriers.

The effect of this discriminatory tax scheme is dramatic. During the tax years 1982 through 1984, Colonial was assessed $731,000.00 more in property taxes than it would have been assessed had it been taxed at the same rate as competing common carriers. Similarly, other petroleum pipeline common carriers have been assessed millions of dollars in property taxes over what they would have been assessed if they had been treated as were competing common carriers in Alabama.

As authorization for such taxation, the State relies upon its interpretation[3] of a circuitous network of statutes and overlapping constitutional provisions. The predecessor of Alabama Code[4] Section 40-21-1, which was adopted in 1935, provided for central assessment of the property of certain companies, such as pipelines. Central assessment, rather than assessment by individual counties, was implemented as a matter of convenience based on the inter-county operational nature of the companies. The statute did not, however, fix tax rates.[5] Before 1972, there

[3]"Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another. Here . . . the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid." *Concordia Fire Ins. Co. v. People of Illinois,* 292 U.S. 535, 545 (1934) (taxation of personal property of foreign insurance corporations at full value while taxing that of domestic competitors at sixty percent of value violated Equal Protection Clause).

[4]Unless otherwise noted, all citations to the Alabama Code will be to the 1975 edition.

[5]The dissenters in the Alabama Supreme Court stated: "This court has previously recognized that central assessment serves a purpose of providing

was no difference between the assessed-value to market-value ratio of property centrally assessed under Section 40-21-1, as opposed to property locally assessed by the individual counties.

In 1972, Amendment 325 to Section 217 of the Alabama Constitution ("Amendment 325") was adopted. Amendment 325 created three classes of property[6] and three ratios of assessment.[7] Amendment 325 defined Class I property as "property of utilities used in the business of such utilities." In 1973, the Alabama legislature attempted to implement Amendment 325 by codifying the amendment's definition of Class I property in Section 40-8-1 of the Alabama Code. The new statute, however, went one step further than Amendment 325 by defining "property of utilities" as "[a]ll property centrally assessed for taxation by the department of revenue pursuant to the provision of [Section 40-21-1]."[8]

In 1978, with the passage of Amendment 373[9] to Section 217 of its Constitution ("Amendment 373"), Alabama began as-

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a procedure for the fair and uniform assessment of property integrated into one operating system or unit which is located in numerous Alabama counties. *State v. Alabama Power Co.*, 254 Ala. 327, 339, 48 So. 2d 445 (1950). While such a purpose justifies different *modes* of taxation amongst members of a class, it does not justify the taxation of property centrally assessed at a higher rate than property locally assessed." App. at A-16.

[6]"Class I. All property of utilities used in the business of such utilities.
Class II. All property not otherwise classified.
Class III. All agricultural, forest and residential property."

[7]" (b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value of such property:
Class I. 30 per centum
Class II. 25 per centum
Class II. 15 per centum"

[8]As noted by the trial court: "Consequently, § 40-21-1 was converted from a statute designed to promote uniformity and fairness in the taxation of property, to a taxing statute by reference only." App. at A-33 to A-34.

[9]Amendment 373 created four classes of property. The definition of Class I property as "property of utilities used in the business of such

sessing the property of petroleum pipeline common carriers for ad valorem taxes at the rate charged public utilities. This ratio of 30 percent of market value was 50 percent higher than the 20 percent ratio charged all other commercial property owners. The Alabama legislature amended Section 40-8-1 to reflect this change.

The State has stipulated that Colonial is a common carrier and that petroleum pipelines and one small barge line are the only common carriers whose property is taxed as Class I utility property. App. at A-28. Colonial owns pipeline and storage tanks in Alabama. This property is part of Colonial's fourteen-state pipeline system which runs from Texas to New York. Since Colonial does not own any petroleum products, it is purely a common carrier transporting products of others in interstate commerce. *Id.*

Colonial appealed to the Circuit Court of Montgomery County, Alabama, from the Alabama Department of Revenue's final assessment of ad valorem taxes on June 21, 1982. The Circuit Court ruled that Alabama's ad valorem tax scheme as applied to petroleum pipeline companies, such as Colonial, violated both Amendment 373 to the Alabama Constitution and the Equal Protection Clauses of the United States and Alabama Constitutions. *Id.* at A-30 to A-31, A-47 to A-49. The Court noted that the "sole reason" provided by the State to justify the divergent treatment of Colonial from other common carriers was that pipeline companies were centrally assessed under Alabama Code Section 40-21-1 and common carrier competitors of pipelines were not centrally assessed. *Id.* at A-41 to A-42, A-49. The Circuit Court found this to be a rationally insufficient justification for the discrimination, particularly in light of the fact that Section 40-21-1 was not even enacted as a taxing statute.

Upon appeal by the State, the Court of Civil Appeals reversed. In reference to the constitutional issue, the Court

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utilities," did not change. Class I property is assessed at 30 percent of market value while Class II property, "[a]ll property not otherwise assessed," is taxed at only 20 percent of market value.

noted that Alabama Code Section 40-8-1 (b) (1) provided a "constitutionally adequate definition of 'utilities.' "[10] App. at A-22. After granting Colonial's petition for a writ of certiorari to the Court of Civil Appeals and hearing oral argument, the Alabama Supreme Court quashed the writ as improvidently granted in a six to three decision. The majority, however, issued no written opinion as contrasted with a lengthy three-justice dissent. *The dissent aptly characterized the effect of the discriminatory tax scheme: "Let the common carriers and energy producers of our nation be forewarned: the footing in Alabama is treacherous." Id.* at A-1. In adopting the opinion of the trial Court, the dissenting Justices emphasized that the State's argument in support of its treatment of Colonial did not withstand minimal scrutiny: "It is in a case such as this one . . . where a classification imposes a more onerous burden upon one member of a class than that which is placed upon others similarly situated, that invidious and intolerable discrimination occurs." *Id.* at A-14.

THE QUESTIONS ARE SUBSTANTIAL

The substantial issue presented by this case is whether Alabama can ignore the dictates of the Equal Protection Clause of the Fourteenth Amendment by its patently discriminatory tax scheme. In several recent decisions, this Court has overturned acts of the Alabama courts and legislature for failing to enforce federal constitutional and statutory law. Four times over the last 18 months alone, this Court has invalidated Alabama

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[10]"It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this court as to its meaning; but it is not true that this court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the federal Constitution." *Hanover Fire Ins. Co. v. Carr*, 272 U.S. 494, 509 (1926) (state's taxation of foreign insurance corporations at 100% of assessed value of net receipts while domestic insurance companies taxed at one-half of sixty percent of assessed value of net receipts violated Equal Protection Clause).

legislation or reversed state court decisions because they were repugnant to federal law.[11] This case presents a similar instance in which Alabama has ignored the mandate of federal constitutional law.

The Alabama ad valorem tax scheme, which is implicated in this case, has generated a number of well-founded federal constitutional challenges. As the Alabama Supreme Court has recognized, "[t]he constitutional and statutory scheme for taxing property in Alabama has generated a substantial amount of concern and controversy over the past two or three decades." *Thorn v. Jefferson County,* 375 So. 2d 780, 783 (Ala. 1979). The federal courts have found occasion to invalidate discriminatory aspects of Alabama's property tax scheme.[12] While the Alabama state courts have been willing to apply direct federal

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[11]In *York International v. Alabama Oxygen Co., Inc.,* ___ U.S. ___, 104 S. Ct. 1260 (1984), this Court vacated the Alabama Supreme Court's ruling that the Federal Arbitration Act did not preempt Alabama's public policy against arbitration of future disputes. In *Wallace v. Jaffree,* ___ U.S. ___, 104 S. Ct. 1704 (1984), this Court ruled that the Alabama statute, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world," was unconstitutional. Similarly, in *Wallace v. Jaffree,* ___ U.S. ___, 105 S. Ct. 2479 (1985), this Court ruled that another Alabama statute, which authorized a daily period of silence in public schools for meditation or voluntary prayer, was unconstitutional. Finally, in *Metropolitan Life Insurance Co. v. Ward,* ___ U.S. ___, 105 S. Ct. 1676 (1985), this Court ruled that an Alabama taxing statute, which imposed a lower tax rate on domestic insurance companies than on out-of-state insurance companies, could not be justified under the Equal Protection Clause based on the grounds asserted by the State.

[12]*See, e.g., Weissinger v. Boswell,* 330 F. Supp. 615 (M.D. Ala. 1971) (holding that the assessment of corporate property at a substantially higher percentage of fair market value that other property in the state, as a result of the systematic refusal of the state department of revenue to perform its duties, constituted a violation of the corporations' constitutional rights under the Fourteenth Amendment); *McCarthy v. Jones,* 449 F. Supp. 480, 484 (S.D. Ala. 1978) (holding that the state ad valorem statute, which assessed property in the same class at different ratios in different counties, was "totally without a rational basis" and was violative of the Fourteenth Amendment).

authority, they have been less than receptive to constitutional challenges to the property tax scheme.[13]

As the three-justice dissent on the Alabama Supreme Court recognized, the state court's approval of the discriminatory tax on Colonial and other petroleum pipeline common carriers goes, "far beyond allowing the legislature broad discretion in tax classification schemes, to the extent of upholding any taxing scheme, regardless how arbitrary, regardless how capricious." App. at A-1. A State cannot be permitted to impose on those subject to its taxing authority an arbitrary and capricious taxing scheme, whether that scheme arises out of deliberate discrimination, inadvertence, or happenstance. In fashioning its property tax system over the past decade, Alabama has repeatedly failed to take into account the minimum requirements of Equal Protection until it is required to do so. Colonial asks this Court to require the Alabama courts and legislature to abide by the Fourteenth Amendment. For the fifth time in 18 months, this Court must mandate that Alabama comport with federal law.

This Court should review the decision below because it upholds a patently discriminatory tax scheme. Although states have wide latitude in fashioning tax laws,[14] "[t]he powers of the state are constitutionally restricted where the state attempts to

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[13] *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979) (following the federal district court decision in *McCarthy v. Jones*, 449 F. Supp. 480 (S.D. Ala. 1978), and holding that there was no rational basis for assessing property in the same class at different ratios in different counties); *Howell v. Malone*, 388 So. 2d 908 (Ala. 1980) (holding that there was no federal constitutional violation arising out of the state's decision to tax single-family owner-occupied residential property at a rate lower than all other residential property).

[14] "Despite the broad range of the state's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. . . . They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Inspec. & Ins. Co. v. Harrison*, 301 U.S. 459, 462 (1937) (citations omitted). *Accord F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("[A] discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory").

impose upon members of a particular class a burden which is not shared by other members of that class. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1958); *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U.S. 459 (1937)." App. at A-12. Similarly situated persons or classes must be treated similarly:

> The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation.

Southern Railway Co. v. Greene, 216 U.S. 400, 412 (1910) (additional franchise tax imposed by Alabama on foreign railway corporation and not imposed on its domestic competitors violated Equal Protection Clause). It is factually undisputed that petroleum pipeline common carriers in Alabama are treated differently for ad valorem tax purposes than all other competing common carriers, with the exception of one barge line. App. at A-28.

State taxing authority unquestionably is subject to the constraints of the Equal Protection Clause. *Louisville Gas & Electric Co. v. Coleman,* 277 U.S. 32, 37 (1928) ("[The Equal Protection Clause] applies to the exercises of all the powers of the state which can affect the individual or his property, including the power of taxation . . . ." (citation omitted)). In addition, as noted by the dissenters in the Alabama Supreme Court, "the equal protection clause applies to the exercise of a state's taxing powers, regardless whether the exercise is 'occasioned by express terms of a statute or by its execution through duly constituted agents.' *Weissinger v. Boswell,* 330 F. Supp. 615, 622 (M.D. Ala. 1971) (quoting *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350, 352 (1918))." App. at A-12. *Accord Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239, 245-46 (1931) (taxation of national banks at higher

rate than domestic competitors violated Equal Protection Clause).

The decision below should be reviewed because Colonial, and all other petroleum pipeline companies with property in Alabama, are economically disadvantaged by the arbitrary action of the State in taxing them at a rate 50 percent higher than competing common carriers.[15] Colonial is obviously a disfavored and captive taxpayer, characteristics which make it a prime target for discriminatory tax treatment. Colonial is not asking this Court to supplant legislative judgment with its own, but rather to enforce time-tested constitutional restrictions.

Although raising revenue is a legitimate function of government, taxation is not a legitimate function when accomplished discriminatorily. In *Metropolitan Life Insurance Co. v. Ward*, ... U.S. ....., 105 S. Ct. 1676 (1985), this Court held that the promotion of domestic business by means of a gross premiums tax was not a legitimate state purpose because it unconstitutionally discriminated against foreign insurance companies. The majority explained that the expressed purposes of the taxation scheme, which included raising revenue, encouraging the formation of new insurance companies in Alabama, and encouraging capital investment by foreign insurance companies, were not legitimate *when furthered by discrimination.* 105 S. Ct. at 1681.

In Colonial's case, the only articulated purpose of placing Colonial's property in Class I utility property for ad valorem tax purposes is to raise revenue. Only the property of petroleum pipeline companies, highly regulated, monopolistic corporations such as utilities, and one small barge line are taxed

[15]Other petroleum pipeline companies, which have been economically disadvantaged by this statutory taxing scheme, have filed suit. *See, e.g., Dixie Pipeline Co. v. State,* Civil Action Nos.: CV-82-930-T, CV-83-1058-PR, CV-84-1018-TH (pending in Montgomery County, Alabama Circuit Court); *Plantation Pipe Line Co. v. State,* Civil Action Nos.: CV-82-977-H, CV-83-1059-PR, CV-84-868-PH (pending in Montgomery County, Alabama Circuit Court). The pending litigation by Plantation Pipe Line, Dixie Pipeline and other petroleum pipeline common carriers with property in Alabama is awaiting the outcome of this case.

at the higher rate of Class I utility property.[16] App. at A-28. The State's purpose, to raise revenue, is accomplished discriminatorily because Colonial is taxed as a utility, when it exhibits no characteristics of utilities. In its findings of fact, the trial court noted the dissimilarities between Colonial and public utilities: Colonial is not treated as a utility under any other Alabama statute; it is not regulated as a utility by any federal agency; it has no guaranteed rate of return on its capital; it does not enjoy monopoly status; it is not required to serve the public more than other common carriers; and contrary to public utilities, which can pass their higher tax rates on to captive consumers, Colonial is subject to intense competition. App. at A-36 to A-41.

The trial court found no reasonable distinction between Colonial and other common carriers, which Alabama taxes at the lower rate. *Id.* at A-41. Indeed, the State stipulated that Colonial is a common carrier. *Id.* at A-28. The State further stipulated that petroleum pipelines, and a single barge line, constitute the only "common carrier," whose property is classified as Class I utility property. *Id.* The fact that Colonial is taxed at a higher rate than other common carriers, which serve the same transportation function, is inconsistent with the underlying principle of the Alabama tax scheme. As the Alabama Supreme Court explained, "[u]nder the classification scheme set forth in Amendment 373, real property is divided into several classes and sub-classes. Under the scheme, property is taxed at a different rate depending on the *use* to which it is devoted." *Howell v. Malone,* 388 So. 2d 908, 913 (Ala. 1980) (emphasis

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[16]Conversely, the only non-utilities that are taxed as Class I properties are petroleum pipeline companies and one barge line. These petroleum pipeline companies are primarily out-of-state corporations, which simply have a portion of their pipeline networks running through Alabama. The effect of the 50 percent higher tax rate on the petroleum pipeline common carriers is to disadvantage those out-of-state companies, which have permanent investments in Alabama, relative to Alabama common carriers. Such a discriminatory effect is proscribed by the Fourteenth Amendment. *Metropolitan Life Ins. Co. v. Ward,* ___ U.S. ___, 105 S. Ct. 1676 (1985); *Southern Railway Company v. Greene,* 216 U.S. 400 (1910).

supplied by court). Here, even though Colonial's property is dedicated to the same *use* as other competing common carriers, *i.e.*, transportation of products for the public, Colonial's property is taxed at a 50 percent higher rate.

The need for review by this Court is underscored by the State's lack of a rational basis for treating Colonial's property differently from that of other common carriers. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), this Court upheld California's retaliatory insurance tax in the face of Equal Protection and Commerce Clause challenges. The Court explained: " 'But there are other subjects as to which such a course is not admissible, the distinguishing principle being that *classification must rest on differences pertinent to the subject in respect of which the classification is made*'." *Id.* at 668, *quoting Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493-94 (1927) (emphasis added). The principle expressed in *Western & Southern* echoes throughout Equal Protection jurisprudence:

> That is to say, *mere* difference is not enough; the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." . . . Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37-38 (1928) (emphasis supplied by court) (citations omitted). *Accord F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (taxation of out-of-state income of domestic corporation doing business within and without state while exempting income derived from out-of-state business of domestic corporation operating only out-of-state violated equal protection clause). Alabama's classification of petroleum pipelines as utilities rather than as common carriers does not rest on the pertinent distinctions required by the Equal Protection Clause.

The differences emphasized by the trial court between utilities and petroleum pipeline companies demonstrate unequivocally that Colonial is not a utility and cannot be classified rationally as a utility. Operating in a highly competitive price-cutting environment, Colonial does not enjoy the benefits that flow from utility status such as state-sanctioned monopolistic power in the marketplace coupled with a guaranteed rate of return on invested capital.

As summarized by the Alabama Supreme Court in its dissenting opinion, the State's articulated reasons for supporting the taxation of Colonial's property at the higher rate are: (1) the existence of certain federal legislation; and (2) administrative convenience. App. at A-15, A-16. Neither of these purported justifications is logically sound or supported by precedent.

The State's first justification for treating the property of Colonial differently from the property of buslines, trucklines, airlines, and water carriers is based on the fact that federal legislation specifically forbids taxation of some of these properties at a higher assessment ratio than other commercial and industrial property (Class II property). Indeed, 49 U.S.C. §§ 11503-11503a prohibit a state from taxing the property of railroads or motor carriers at a rate in excess of that imposed on other commercial property. As noted by the dissenters in the Alabama Supreme Court, the State's argument is flawed internally. *Id.* at A-15. Section 11503a became law in 1980. The State, however, has assessed the property of bus and trucklines as Class II commercial property since the initial enactment of Amendment 325 in 1972. *Id.* Thus, the State accorded preferential treatment to motor carriers long before Section 11503a required uniformity in taxation.

This Court recently rejected a similar attempt at retroactive justification of a discriminatory statute in *Hooper v. Bernalillo County Assessor,* ____ U.S. ____, 105 S. Ct. 2862 (1985). In *Hooper,* a New Mexico statute which granted annual property tax exemptions for certain Vietnam War veterans, but not for others, was held violative of the Equal Protection Clause. The

statute, enacted in 1983, applied only to veterans who moved into New Mexico prior to May 8, 1976. The State asserted two purposes for the statute: (1) the exemption encouraged veterans to settle in the State; and (2) it served as an expression of the State's appreciation for military service. This Court determined that the statute's distinction between two categories of resident veterans was not rationally related to the State's asserted legislative goal: "The Legislature cannot plausibly encourage veterans to move to the State by passing such retroactive legislation." *Id.* at 2867. In other words, a statute passed in 1983 could not possibly encourage veterans to settle in the state if the "triggering event" occurred eight years prior to the date of enactment. Similarly, Alabama cannot justify discriminatory treatment of Colonial on the basis of federal legislation which was passed years after the enactment of the discriminatory classification. The analogy between *Hooper* and Colonial's case is sound: A state may not justify retroactively a classification scheme by reference to motives that could not have been present at the time of enactment. In *Hooper,* the Court appropriately held that the New Mexico veterans' tax exemption violated the guarantees of the Equal Protection Clause of the Fourteenth Amendment. This Court should accord Colonial the same protection.

Alabama's legislative justification rationale also fails under the analysis employed by this Court in *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23 (1931). In that case, this Court held that intentional systematic undervaluation of taxable property in one class contravened the constitutional right to equal protection of any person taxed on the full value of his property in the same class. In *Cumberland Coal,* the problem arose because an injured taxpayer faced the insurmountable burden of securing an increase, by judicial proceedings, in the assessment of the great mass of underassessed property in his class. Accordingly, the Court ruled that, "the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure

from the requirement of the statute." *Id.* at 29 (quoting *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 446 (1923)). *See Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239, 247 (1931). The Court's conclusion was based on the ultimate purpose of the tax scheme that members of the same class are to be treated equally.

If, as in *Cumberland Coal,* uniformity must reign in the face of intentional systematic undervaluation of taxable property, then uniformity should also be the foremost purpose of prohibitive federal legislation such as 49 U.S.C. § 11503a. The State argues that Colonial's contention in this regard leads to the conclusion that Section 11503a is unconstitutional. On the contrary, Colonial asserts that Alabama's taxing scheme is rendered unconstitutional by the State's failure to articulate any rational basis for the disparate treatment of Colonial, which is not the subject of federal legislation. Since the State has asserted no supportable reason for the difference in treatment, Colonial is entitled to the lower rate assessed against competing common carriers.

The State's second justification for taxing Colonial's property at a higher rate than that of other common carriers is administrative convenience.[17] Colonial agrees that petroleum pipelines by necessity must be valued as a unit rather than in separate parts in order to arrive at a valid appraisal of the fair market value of their property. Central assessment, however, does not justify or mandate a higher tax rate. After centrally

[17]It is not uncommon for Alabama to assert administrative convenience as justification for disparate tax treatment. In *Weissinger v. White,* 733 F. 2d 802 (11th Cir. 1984), the State defended against a constitutional challenge to its practice of assessing property in a single classification by two different methods. One claim advanced by the State was that individualized assessment of income-producing property was not administratively feasible. Since it found that the State's second justification was constitutionally sufficient, the Eleventh Circuit stated that, "we need not reach the question of whether administrative convenience alone would constitute a sufficient excuse. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) (administrative convenience alone will not justify disparate treatment based on sex)." *Id.* at 806.

assessing Colonial's property, the State could just as easily apply the 20 percent Class II ratio as opposed to the 30 percent Class I ratio. Hence, the administrative efficiency argument has no logical foundation.

Moreover, this Court has found administrative efficiency to be insufficient to mandate constitutionality. In *Stanley v. Illinois,* 405 U.S. 645 (1972), this Court stated that, "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general . . . that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Id.* at 656 (footnote omitted). Time and again, this Court has rejected claims of administrative efficiency as a sufficient basis for upholding state action against claims of constitutional invalidity. *See, e.g., Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 647 (1974) ("[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law"); *Vlandis v. Kline,* 412 U.S. 441, 451 (1973) ("The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised"); *Frontiero v. Richardson,* 411 U.S. 677, 690 (1973) (citations omitted) ("[O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.' . . . And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."); *Shapiro v. Thompson,* 394 U.S. 618, 633-39 (1969); *Carrington v. Rash,* 380 U.S. 89, 96 (1965).

Thus, Alabama's purported justification of administrative

efficiency as grounds for its discriminatory tax is neither logically sound nor judicially supported.

This Court must review the decision of the Alabama appellate courts because no conceivable basis can support the unreasonable and inequitable classification of Colonial's property as Class I utility property. As the trial court found, Colonial bears no resemblance to public utility corporations which can justifiably be taxed at the higher rate. App. at A-36 to A-41. Utilities may recoup the additional tax burden by raising the rates charged to consumers in a totally regulated and non-competitive market. Colonial, on the other hand, is unable to compensate for this excess burden without suffering a severe competitive disadvantage: Its common carrier competitors pay a lower rate and thus have no need to pass higher taxes on to their customers. The State's unsupported reasons for the disparity in tax treatment do not address the fact that pipeline companies are taxed differently from other similarly-situated commercial property owners. This practice results in the assessment of the property of petroleum pipeline common carriers in Alabama at a rate 50 percent higher than that of their common carrier competitors in violation of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

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September 9, 1985

APPENDIX

THE STATE OF ALABAMA –
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1984-85

Ex parte Colonial Pipeline Company

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS

(Re: State of Alabama
83-564 v.
Colonial Pipeline Company)

BEATTY, JUSTICE.

WRIT QUASHED AS IMPROVIDENTLY GRANTED.

Torbert, C. J., Maddox, Jones, Almon, and Shores, JJ., concur.

Faulkner, Embry, and Adams, JJ., dissent.

EMBRY, JUSTICE (Dissenting).

I respectfully dissent. In my view, the Court of Civil Appeals clearly made new findings of fact in the opinion below and thereby overturned the nonjury findings of the trial court without justification. Second, the Court of Civil Appeals has gone far beyond allowing the legislature broad discretion in tax classification schemes, to the extent of upholding any taxing scheme, regardless how arbitrary, regardless how capricious. Lastly, this case throws the holding in *Delta Airlines v. Department of Revenue,* Civil Action No. CV-80-116-6, ironically, a case upon which the Court of Civil Appeals relied, into serious question. Let the common carriers and energy producers of our nation be forewarned: the footing in Alabama is treacherous.

Colonial Pipeline Company (hereafter Colonial) petitions this court to review the Alabama Court of Civil Appeals' decision reversing a declaratory judgment entered by the Montgomery County Circuit Court arising out of an ad valorem tax

assessment ruling by the Alabama Department of Revenue (hereafter the Department). The trial court found that the Department unlawfully assessed Colonial's property as Class I property within the meaning of Amendment 373 to Section 217 of the Constitution of Alabama (1901). I would find that the assessment of Colonial's property as Class I for ad valorem tax purposes is in violation of both the equal protection guarantees of the Fourteenth Amendment to the United States Constitution and Sections 1, 6, and 22 of the Alabama Constitution.

This case was presented *ore tenus* and as such the trial court's findings should not be disturbed, absent plain and palpable error. *Ford v. Alabama By-products Corp.*, 392 So. 2d 217 (Ala. 1980). After a careful review of the entire record, I conclude that the trial court's findings of fact are more than amply supported by the record and therefore must stand. The significant portions thereof are set out below:

"A. *Findings of Fact*

"1. *History of Alabama's Constitutional and Statutory Provisions.*

"In 1935, the Alabama legislature enacted the predecessor of what is now § 40-21-1 of the *Code of Alabama* 1975. Section 40-21-1 provides that the Department shall assess for taxation the property of various taxpayers, including the property of pipelines transporting oil, gasoline or other commodities of commerce, as well as the property of all public service or public utility corporations. The section does not set, or attempt to set, the ratio to market value at which the property of a particular taxpayer will be assessed for ad valorem tax purposes. The section simply provides that the property of such taxpayers will be centrally assessed by the Department, rather than being locally assessed by the tax assessors of the various counties. At the time of its enactment, the purpose of § 40-21-1 was to provide a convenient, uniform and fair assessment of the property of taxpayers engaged in multi-county and multi-state operations, and the Department acknowledges that § 40-21-1 was not a taxing statute. The Department readily admits that § 40-21-1 requires the central assessment of both utility and non-utility taxpayers.

"Until 1972, central assessment, as opposed to local assessment, was of no significance in determining a taxpayer's ad valorem tax liability. Central assessment was primarily a matter of convenience for both the Department and taxpayers. Although the property was assessed by the Department, the tax was paid directly to the counties based on an apportionment of the assessed property values among the appropriate counties by the Department. The ratio of assessed value to market value for property which was centrally assessed was exactly equal to the ratio of the assessed value to market value for property which was locally assessed. The rate of tax was likewise the same for centrally assessed property and locally assessed property. This uniformity of taxation for all property was required by Sections 211 and 217 of the Alabama Constitution.

"In 1972, however, Section 217 of the Alabama Constitution was amended by the passage of Amendment 325. Amendment 325 provided for the division of all taxable property within the State of Alabama into three classes for the purposes of ad valorem taxation. The amendment further provided differing ratios of assessment to be applied to each of the three classes of property. In pertinent part, Amendment 325 provided as follows:

> "(a) All taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:
>
> "Class I. All property of utilities used in the business of such utilities.
>
> "Class II. All property not otherwise classified.
>
> "Class III. All agriculture, forest and residential property.
>
> "(b) With respect to ad valorem taxes levied by the State, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value of such property:
>
> "Class I. 30 per centum
>
> "Class II. 25 per centum
>
> "Class III. 15 per centum
>
> "(c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authority, all

> taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes of property defined in paragraph (a) herein and at the same ratios of assessed value to the fair and reasonable market value thereof as fixed in paragraph (b) herein. . . .

Although the adoption of Amendment 325 brought to an end the requirement of absolute uniformity in the taxation of all property, the uniform taxation of all property within the same class was still required by the Alabama and United States Constitutions.

"The clear and unambiguous language of Amendment 325 provided that Class I property consisted only of 'property of utilities used in the business of such utilities.' The constitutional amendment did not designate which taxpayers constituted utilities, nor did it define 'property of utilities.' However, in 1973, the Alabama legislature enacted § 40-8-1 of the *Code of Alabama* 1975 purporting to implement the provisions of Amendment 325. In defining Class I property, § 40-8-1 (a) merely tracks the language of the constitutional amendment and defines Class I property as 'property of utilities used in the business of such utilities.' Section 40-8-1 (b) (1), however, defines the 'property of utilities' as '[a]ll property assessed for taxation by the department of revenue pursuant to the provisions of [§ 40-21-1].' Consequently, § 40-21-1 was converted from a statute designed to promote uniformity and fairness in the taxation of property, to a taxing statute by reference only.

"As stated, § 40-21-1 requires the central assessment of the property of numerous taxpayers which are not utilities. Therefore, the property of numerous non-utilities is presently being assessed as Class I property, rather than as Class II property, in direct contradiction to the Alabama Constitution. Despite this fact, the Department has done nothing to assess as Class I property only the property of those taxpayers which are centrally assessed and which are also utilities. The Department has taken the position that if a taxpayer is centrally assessed under § 40-21-1, its property constitutes Class I property whether or not the taxpayer is a utility. This position has been taken by the Department despite the clear language of Amendment 325 which defined Class I property solely as the 'property of utilities used in the business of such utilities.'

"Section 217 of the Alabama Constitution was further amended in 1978 by the passage of Amendment 373. As a result of Amendment 373 to the Alabama Constitution, there are now four classes of property, rather than three classes. Class I property is still defined as the 'property of utilities used in the business of such utilities,' and is still to be assessed at a ratio of 30 percent of market value. Class II property retains its definition as '[a]ll property not otherwise classified,' but it is now assessed at a ratio of only 20 percent of market value.

"After the adoption of Amendment 325 in 1972 and the enactment of implementing legislation, Colonial, as well as other non-utility taxpayers which were centrally assessed by the Department, had their property assessed at 30 percent of market value as Class I property, rather than at 25 percent of market value as Class II property. Consequently, these non-utility taxpayers paid ad valorem tax equal to 120 percent of the amount they would have paid if their property had been assessed as Class II commercial property.

"In 1978, however, the burden of being taxed as a utility became much greater. After the adoption of Amendment 373, the property of utilities was still assessed at a ratio of 30 percent of market value as Class I property, but other commercial property was assessed at a reduced ratio of only 20 percent of market value as Class II property. As a result, the property of non-utilities which was centrally assessed was effectively taxed at a rate equal to 150 percent of the rate imposed on the property of non-utilities which was locally assessed.

"2. *Description of Colonial.*

"Colonial is engaged in the interstate transportation of refined petroleum products by pipeline to and through the State of Alabama, among other points, in a 14-state region. The property of Colonial which is subject to ad valorem tax in the State of Alabama consists primarily of pipelines and operating tankage, all being dedicated to, and used solely and exclusively in, interstate commerce. Colonial does not own any of the refined petroleum products which it transports through its pipelines, nor does Colonial sell any refined petroleum products for its own account or for the account of others. Therefore, Colonial is a transportation company merely providing one alternative mode of transporting petroleum products.

"Colonial's pipeline system begins in the Houston, Texas, area and terminates in the New York City metropolitan area. Approximately two percent of the total refined petroleum products transported by Colonial are delivered to points in the State of Alabama, but no product in the Colonial System originates in Alabama. Refined petroleum products delivered by Colonial to Alabama constituted 28.6 percent of the total refined petroleum product utilized in Alabama during 1980, and 34.3 percent of the product utilized in Alabama during 1981. The remaining percentage of refined petroleum products utilized in Alabama was delivered by modes of transportation in competition with Colonial.

"3. *Colonial is Not treated as a Utility by Any Other Alabama Statute.*

"Colonial does not pay, nor has the Department sought to impose, the public utility license tax imposed by § 40-21-50 of the *Code of Alabama* 1975, the utility gross receipts tax imposed by § 40-21-80 of the *Code of Alabama* 1975, or the utility service use tax imposed by § 40-21-100 of the *Code of Alabama* 1975. Moreover, the Alabama Public Service Commission has never asserted jurisdiction over Colonial pursuant to either § 37-2-1 *et seq.* or § 37-4-1 *et seq.* of the *Code of Alabama* 1975, or any other provision of the statutes of the State of Alabama.

"4. *Colonial is Not Subject to 'Utility' Type Regulation by any Federal Agency.*

"Commencing with the passage of the Hepburn Act in 1906, common carrier pipelines transporting crude oil and refined petroleum products have been subject to federal regulation. The regulation of both crude oil and product pipelines is substantially identical; therefore, future reference will be made to them jointly as 'oil pipelines.' The Interstate Commerce Commission ("ICC") exercised jurisdiction over oil pipelines from 1906 to 1978, at which time jurisdiction was transferred to the Federal Energy Regulatory Commission ("FERC"). The purpose of the 1906 regulation of oil pipelines was to assure independent producers and refiners of petroleum fair access to the pipelines owned by integrated oil companies, such as Standard Oil. The focus of oil pipeline regulation has not been the protection of the consumer of petroleum products which is in

marked contrast with the focus of the regulation imposed on utilities, such as electric and telephone companies. It is noted that the ultimate consumer is affected very little by the transportation rates charged by oil pipelines. Typically, the cost of transporting gasoline by pipeline ranges from approximately one to two cents a gallon, or roughly one to two percent of the price of gasoline at the pump. Therefore, oil pipeline charges do not have a significant impact on consumers.

The 1906 statute requires that oil pipeline rates be just and reasonable, and forbade undue preference and prejudice between shippers of petroleum products in the utilization of the pipelines. However, there has never been any federal control over 'entry' into the oil pipeline business, either for the movement of crude oil or refined product. Therefore, an oil pipeline has absolutely no regulatory protection from competition by newly-constructed pipelines since a new, competing pipeline can be constructed without the necessity of any regulatory approval. Likewise, there is no federal regulation on the 'exit' or termination of an oil pipeline. That is, an oil pipeline can terminate services, in whole or in part, without receiving any regulatory approval.

"While the 1906 statute requires that oil pipeline rates be 'just and reasonable,' neither the ICC nor FERC has been disposed to examine such rates pipeline-by-pipeline, point-to-point. Instead, they have left the setting of rates to competition and bargaining between the pipeline operators and their commercial customers. The regulators have set overall industry maximum rates of return, but have refrained from becoming involved in the details of specific pipeline rates. This low-level involvement in the regulation of oil pipeline rates is to be contrasted with the rate regulation imposed on utilities, such as electric and telephone companies. When an electric or telephone company proposes a change in its rates, its application is examined in depth and usually made the subject of hearings at which the cost of service is probed, customer class by customer class, and rate levels and rate relationships are reviewed. In short, utility rate regulation is meticulously detailed and repetitive from case to case, as contrasted to the almost nonexistent rate regulation of oil pipelines.

The regulation of utility rates must necessarily focus on the ultimate consumer of the utility service because this

regulation is the only protection the consumer has from the monopolistic status of the utility. However, in exchange for this extensive rate regulation, utilities are guaranteed a certain rate of return on their investment. On the other hand, consumers of refined petroleum products need no protection from the rates charged by oil pipelines because the pipelines do not enjoy monopolistic status nor are they guaranteed a certain rate of return on their investment.

Within the broad industry guidelines set by the ICC, and now FERC, oil pipelines set their rates just as any other business. Rates are based on the cost of providing competitive restraints. Once rates have been established, they are published in a tariff which is filed with FERC. These rates go into effect automatically unless a formal complaint is filed with FERC with respect to such rates. Harry B. Greene, Administrator-Property Tax of Colonial, testified that there has never been a shipper complaint filed with either the ICC or FERC with respect to a Colonial rate. He further testified that all Colonial rates have been allowed to go into effect without a formal hearing and without change.

"Regulation in and of itself is not determinative of utility status. Only certain types of regulation are common to public utilities. Utility regulation is designed to protect the ultimate consumer through detailed regulation of rates and required approval of the utility's entry into or exit from a market area. In short, utility regulation is a substitute for competition. The regulation of utilities must be accompanied by certain rights and privileges bestowed upon the utility. Utilities, for example, are protected from competition and are at least granted quasi-monopoly status. Conversely, the regulation of oil pipeline rates is minimal, and oil pipelines are not subject to entry or exit regulation. Oil pipelines are not granted any monopolistic position with respect to their service area, nor are they protected in any way from competition by other pipelines or other transportation modes.

"Although oil pipelines were granted the ability to acquire right-of-way condemnation in Alabama in 1973, Colonial has never utilized, nor sought to utilize, this right. Colonial acquired all of its right-of-way in the State of Alabama through negotiation. . . .

". . . .

"5. *Colonial is Subject to Intense Competition.*

"As stated, oil pipelines are not granted a monopolistic position with respect to their service areas and are not protected from competition. The classic example of the competition to which oil pipelines are subject is the competition between Colonial and Plantation Pipe Line Company ('Plantation'), which operate parallel product pipelines from the Gulf Coast to the Eastern Seaboard. During the 1950's Plantation exclusively served this route. However, following the completion of the larger, more-efficient Colonial system in the early 1960's, Plantation was forced both to reduce its rates and to expand capacity to remain competitive. Although Colonial's rates were uniformly lower than Plantation's when the Colonial system was first built and remained that way for a number of years, at present the point-to-point rates of Plantation are oftentimes lower than Colonial's rates. This is a prime example of the effect of competition on oil pipeline rates by another common carrier which is free to enter the market at any point without regulatory approval.

"In addition to head-to-head competition from other pipelines, Colonial also faces competition from alternative sources of supply of a petroleum product for its market area and from crude oil pipelines. Moreover, Colonial faces substantial intermodal competition from coastal tankers and intercoastal barges. The distribution of petroleum products transported through the Colonial system via distribution pipelines is also subject to substantial competition from trucklines. It is noted that none of Colonial's intermodal competitors are utilities, and none are taxed as such by the Department.

"6. *Comparison of Colonial's Regulation With the Regulation of Other Carriers.*

"Prior to 1980, railroads were intensely and broadly regulated by the ICC. With the enactment of the Staggers Act in 1980, some deregulation of railroads is now taking place; however, a substantial degree of regulation remains. The ICC retains control over a railroad's entry into or exit from a particular market area. The ICC also must approve the acquisition or merger of railroads. In addition, the ICC has remained very active in the regulation of railroad rates even after partial deregulation.

"As the result of the Motor Carrier Act of 1980, the trucking industry has moved toward reduced or 'revised' regulation, to be distinguished from deregulation. ICC control over entry into new markets was eased, but permission is still required, and the ICC must make specific case-by-case findings as to the impact of a grant of new authority on existing carriers. Likewise, ICC control over the abandonment or exit from a market has been eased, but its authority still remains. A zone of freedom has been established for the trucking industry within which rate changes may be made free from regulation; however, outside this zone, rates remain subject to ICC regulation.

"Prior to September, 1982, the regulation of interstate business [sic] was very extensive. The Bus Regulatory Reform Act of 1982 sought to place greater reliance on competition and bring about reduced regulation, as distinct from deregulation. The applicable entry or exit standards were eased, but ICC approval is still required in order to enter a new market or exit from an existing market. As with the trucking industry, bus carriers have been given a zone of freedom within which they may set rates free from regulation; however, outside this zone, rates are still subject to regulation.

"The ICC has exercised broad regulatory authority over common carrier barge service since 1940. This regulation remains essentially unchanged to date.

"The deregulation of air transportation for both passenger and cargo service clearly has gone further than that of the rail, truck, bus or water carrier industries. Control over entry and exit has now been eliminated for practical purposes. The airlines also are now free to set rates as they wish. In many respects, the regulatory posture of air transportation has now been placed on a par with that which has long been characteristic of the oil pipelines, i.e., competition is now relied upon rather than regulation of entry, exit and rates. However, airlines are still not quite as free from regulation as oil pipelines. The Federal Aviation Administration continues to control the number of permissible operations, i.e., arrivals and departures, at major airports. Therefore, even though an airline is free to begin service to a new market area, if there is insufficient capacity at the airport serving that area, the airline cannot commence service.

"7. *Colonial Is Not Required to Serve the Public to Any Greater Extent Than Other Common Carriers.*

"This Court finds that Colonial is under no greater obligation to serve the public than are other common carriers. In fact, due to the 'batching' requirements of Colonial, it serves a very limited 'public' which is not indicative of utility status."

"8. *There is No Reasonable Distinction Between Oil Pipelines and Other Common Carriers Upon Which to Base the Different Tax Treatment.*

"Oil pipelines, together with a single barge company, are the only common carriers the property of which is assessed by the Department as Class I property. The sole reason advanced by the Department for the different treatment of these taxpayers and other common carriers such as trucklines, buslines or airlines, is that the property of pipelines and bargelines is centrally assessed by the Department because of their enumeration in § 40-21-1, whereas, the property of the other common carriers is not centrally assessed by the Department. Mr. Barber has testified that oil pipelines are less regulated than railroads, trucklines and buslines, even after the deregulation of these carriers. Further, Mr. Barber testified that oil pipelines are no more regulated than airlines after their deregulation, and are probably less regulated due to the airport capacity regulation of the Federal Aviation Administration. . . ." (Footnotes omitted.)

The dispositive issue presented is whether the Department's assessment of Colonial's property as Class I utility property for purposes of ad valorem taxation denies Colonial the equal protection of the laws as guaranteed by the United States and Alabama Constitutions.

The Fourteenth Amendment to the United States Constitution guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." For over a hundred years, the United States Supreme Court has interpreted the "equal protection clause" to mean that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis,*

101 U.S. 22, 31 (1880). Alabama's Constitution offers similar equal protection guarantees through a combination of Sections 1, 6, and 22. *Black v. Pike County Commission,* 360 So. 2d 303 (Ala. 1978); *City of Hueytown v. Jiffy Chek Co.,* 342 So. 2d 761 (Ala. 1977).

It is beyond dispute that the equal protection clause applies to the exercise of a state's taxing powers, regardless whether the exercise is "occasioned by express terms of a statute or by its execution through duly constituted agents." *Weissinger v. Boswell,* 330 F. Supp. 615, 622 (M.D. Ala. 1971) (quoting *Sunday Lake Iron Co. v. Township of Wakefield,* 249 U.S. 350, 352 (1918)). The powers of the state are constitutionally restricted where the state attempts to impose upon members of a particular class a burden which is not shared by other members of that class. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1958); *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U.S. 459 (1937). On this point the Supreme Court has confirmed that:

> "the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances . . . and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. . . ."

Louisville Gas and Electric Co. v. Coleman, 277 U.S. 32, 37 (1928).

This is not to say that the Equal Protection Clause mandates any rigid rule of uniformity of taxation. It is inherent in the state's power to tax that it be free to select the subjects of taxation, and to grant exemptions. *Carmichael v. Southern Coal and Coke Company,* 301 U.S. 495 (1937). In this respect, Congress, as well as state legislatures, have been afforded the widest of possible latitudes in selecting persons or property to be taxed. *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937); *Thomasville Automotive Parts v. United States,* 429 F. Supp. 133 (M.D. Ga. 1976). Consequently, a state's exercise of the power to tax is presumed constitutional. *Howell v. Malone,* 388 So. 2d 908, 911 (Ala. 1980).

Nevertheless, there is a point beyond which that state may not go without violating the Equal Protection Clause. The state must proceed on a rational basis and cannot resort to palpably arbitrary classifications. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1958). Where a state law discriminates in favor of a certain class, the discrimination must be "founded upon a reasonable distinction, or difference in state policy." *Kahn v. Shevin,* 416 U.S. 351, 355 (1974).

This court has also recognized the "rational basis" test. See *Gideon v. Alabama State Ethics Commission,* 379 So. 2d 570 (Ala. 1980). Under this test, the judicial inquiry becomes:

> " '(a) Whether the classification furthers a proper governmental purpose, and (b) whether the classification is rationally related to that purpose.' "

Howell v. Malone, 388 So. 2d 908, 911 (Ala. 1980) (quoting *Gideon v. Alabama State Ethics Commission,* 379 So. 2d 570 (Ala. 1980)). Of course the burden of proving the unconstitutionality of a particular taxing scheme rests with the party attacking the legislation. *Howell v. Malone,* 388 So. 2d 908, 911 (Ala. 1980).

In this case, it is incumbent upon Colonial to negate every conceivable basis which might support assessing its property as Class I utility property assessing [sic] property of other common carriers at a lower rate. *Lehnhausen v. Lakeshore Auto Parts Co.,* 410 U.S. 356, 364 (1973).

The classification of properties for purposes of varying ad valorem tax rates, under Amendment 373 to the Alabama Constitution, undoubtedly serves a proper governmental purpose. Taxes are a legitimate means by which to distribute the costs of government. Apportioning a greater share of governmental costs to those who enjoy the use of public property or special franchises has been recognized as a proper governmental purpose. See *Rapid Transit Co. v. New York,* 303 U.S. 573 (1938). In fact, this court expressly upheld Alabama's taxing scheme, as set out by Amendment 373, in *Howell v. Malone,* 388 So. 2d 908 (Ala. 1980).

Colonial concedes the right of the state to discriminate against taxable entities based upon a valid governmental purpose where the enacted legislation is rationally related to that purpose. Nevertheless, Colonial argues that the inclusion of its property as Class I property is not rationally related to any state interest, but rather, is arbitrary and capricious. To support this argument, Colonial offers evidence proving that the properties of similarly situated, and competing taxpayers, specifically, other common carriers, are classified as Class II property.

The trial court found that there was "no rational basis, nor any rational distinction related to the utility classification which would justify treating an oil pipeline differently for tax purposes than any other kind of common carrier transportation company." After a careful review of the record, I am in agreement with the trial court.

The equal protection clause tolerates classifications in taxation so long as those common to a class share an equal burden. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1958). It is in a case such as this one, however, where a classification imposes a more onerous burden upon one member of a class than that which is placed upon others similarly situated, that invidious and intolerable discrimination occurs.

Colonial is in a highly competitive market with its chief competitors being other pipelines, coastal tankers, barges, railroads, and trucks. However, evidence produced at trial established that properties of interstate buslines, trucklines, airlines, and water carriers are all classified as Class II property, and therefore taxed at a substantially lower rate than that of Colonial. In fact, oil pipelines, in addition to a single barge company, are the only common carriers whose properties are assessed as Class I property.

Thus, the proper judicial inquiry becomes whether the assessment of Colonial's property as Class I property, while simultaneously assessing property of other common carriers at a lower rate, is rationally related to a proper governmental purpose.

In order to address this inquiry, I turn now to the numerous justifications, raised by the Department, which allegedly warrant this discriminatory tax treatment.

The Department argues, and the Court of Civil Appeals agreed, that the discriminatory tax treatment imposed upon Colonial is essentially the result of compliance with federal legislation which prohibits a state from assessing the property of railroads or motor carriers at a rate in excess of other commercial property rates. See 49 U.S.C. § 11503.

This argument loses its force in light of the fact that 49 U.S.C. § 11503 was not enacted until 1980. However, properties of motor carriers, such as truck lines [sic] and buslines, have been assessed as Class II property since the initial enactment of Amendment 325 in 1972. Thus, the property of motor carriers had received favorable tax treatment in Alabama for eight years prior to the enactment of the federal legislation. Such federal legislation cannot be said to retroactively justify the discrimitory tax treatment existing prior to its enactment.

In a similar argument, the Court of Civil Appeals noted that the Department is prohibited from assessing property of airlines as Class I property under the Montgomery County Circuit Court ruling in *Delta Airlines v. Department of Revenue,* Civil Action No. CV-80-116-6. In that case, the court found that property of airlines could not be classified as Class I property because airlines were *not* utilities as that term is used in Amendment 373. The court reasoned that there was no rational basis for distinguishing between airlines and competing common carriers for ad valorem tax purposes. Such a case can hardly serve as the basis for a classification of Colonial as a utility. To the contrary, it adds further support to Colonial's contention that no rational basis exists for treating its property differently from that of other common carriers with which it competes in the petroleum transportation industry.

Neither may such discriminatory tax treatment be justified on "administrative" grounds. The Department argues that because property of Colonial is centrally assessed, under Code 1975, § 40-20-1, as opposed to that of other common carriers,

which is assessed locally, administrative convenience justifies discriminatory tax treatment. As did the trial court, I would find that central assessment, in and of itself, provides no basis for varying ad valorem tax rates between common carriers. This court has previously recognized that central assessment serves a purpose of providing a procedure for the fair and uniform assessment of property integrated into one operating system or unit which is located in numerous Alabama counties. *State v. Alabama Power Co.,* 254 Ala. 327, 339, 48 So. 2d 445 (1950). While such a purpose justifies different *modes* of taxation amongst members of a class, it does not justify the taxation of property centrally assessed at a higher rate than property locally assessed.

Lastly, the Department relies heavily upon the case of *Howell v. Malone,* 388 So. 2d 908 (Ala. 1980), as authorizing an assessment of Colonial's property at a higher rate than that of other common carriers. In *Malone,* this court upheld, against a constitutional attack, the assessment of "one-family-owner-occupied residential property" at a lower rate than other residential property.

The classifications in *Malone* were based upon the presumed use of the property, which this court found to be rationally related to a proper governmental purpose. Noting that the property classifications reflected the social and economic beliefs of the legislature, this court stated:

> "The taxing scheme in question places a greater tax burden on those who are using their residential property for income-producing purposes. This is rational. The discrimination can be justified on the basis that the government is either providing more governmental services, on the one hand, or, on the other hand, is interested in relieving the tax burden on specified property owners to further some social or economic policy." *Id.,* 388 So. 2d at 914.

In contrast to the scenario in *Malone,* Colonial's property may not be distinguished by use from the property of other common carriers in the oil and gas transportation business.

Neither may it be said, under the facts presented, that the government provides more services to Colonial than to other common carriers, or that some social policy is furthered by taxing Colonial at a higher rate than its competitors.

Based upon the foregoing, I conclude that there is no rational basis for taxing Colonial's property as Class I property, while taxing that of other competing common carriers as Class II property. As the trial court adeptly noted, "the legislature has attempted to provide a detailed definition of a phrase used in the Alabama Constitution generally descriptive of a class of property by incorporating by reference a longstanding statutory provision, the purpose of which has no relation to the classification scheme now mandated by the Constitution." Consequently, I would hold that Colonial, by having its property assessed as Class I property of a utility within the meaning of Amendment 373, to Section 217 of the Constitution of Alabama, has been denied the equal protection of the laws guaranteed by the United States and Alabama constitutions. Accordingly, I would reverse the judgment of the Court of Civil Appeals.

Faulkner and Adams, JJ., concur.

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

Re: CIV. 3824 February 29, 1984

STATE OF ALABAMA, *Appellant*
vs.
COLONIAL PIPELINE COMPANY, *Appellee*

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell____ granted 7 additional days to file brief(s) to and including

____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

____ Record on Appeal filed on this date.

____ Appendix Filed on this date.

____ Submitted on Briefs

xxx Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted

____ Rules suspended,

____

MAILING ADDRESS:
2600 East South Boulevard,
Room 250
Montgomery, Alabama 36116

/s/ JOHN H. WILKERSON, JR.
Clerk, Court of Civil
Appeals of Alabama

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT THE COURT OF CIVIL APPEALS OCTOBER TERM 1983-1984

Civ. 3824

State of Alabama

v.

Colonial Pipeline Company, a Corporation

Appealed From Montgomery County Circuit Court

WRIGHT, Presiding Judge

This is an ad valorem tax assessment case.

Appellee, Colonial Pipeline Company (Colonial), is a corporation duly organized under the laws of Delaware and is qualified to do business in the State of Alabama. Colonial is engaged in the interstate transportation of refined petroleum products by pipeline to and through Alabama as well as other points in a fourteen-state region. Colonial's property, subject to ad valorem taxes in Alabama, consists primarily of pipelines and operating tankage which are all dedicated to and used solely and exclusively in interstate commerce.

On June 4, 1982, the Alabama Department of Revenue (Department) [1] issued notice to Colonial for the 1982 tax year of a tentative valuation for ad valorem tax purposes in the amount of $22,800,000 on Colonial's property located in Alabama. This assessment reflects the use of a thirty percent (30%) assessment factor applied by the Department to ninety percent (90%) of the market value of the property based on the characterization of such property as Class I property.

The Department scheduled a hearing and notified Colonial. Colonial filed a written protest against the tentative assessment

[1] Although the named appellant in this case is the State of Alabama, the Alabama Department of Revenue administers the ad valorem tax at issue in this case; therefore all further references will be to the department rather than the State of Alabama.

proposed by the Department. The Department overruled the protest and entered a tax assessment of $725,000 based upon a property valuation of $22,800,000.

Colonial appealed to the Circuit Court of Montgomery County pursuant to §§ 40-2-22, 40-21-24 of the Code of Alabama 1975, claiming that its property was unlawfully assessed as Class I property and that § 40-8-1 of the Code is unconstitutional on its face and as applied in this case. Colonial claims that assessing its property as Class I property violates Ala. Const. art. XI, §§ 211, 217 (as amended by Ala. Const. amend. 373); art. IV, § 44 and art. XI, § 212, and the fourteenth amendment of the United States Constitution.

The trial court, in a twenty-two page order, found that § 40-8-1's definition of Class I property as that property assessed by the Department of Revenue under § 40-21-1 is contrary to the provisions of amendment 373 because it is overbroad; it converted § 40-21-1 into a taxing statute, and § 40-21-1 covers numerous taxpayers which are not utilities. This court considers that all of those findings are conclusions of law and erroneous. The last finding is also overbroad and improper because it includes parties and properties not involved in this case—this case relates only to the property of Colonial Pipe Lines. The second finding is not a proper construction of § 40-21-1. The first is an erroneous construction of § 40-8-1. We discuss these propositions and others hereafter because Colonial's argument tracks the order of the trial court.

In 1935 the legislature enacted the predecessor of what is presently § 40-21-1, Code of Alabama 1975. Section 40-21-1 provides that the department shall assess for taxation the property of various taxpayers including the property of pipelines transporting oil, gasoline or other commodities of commerce as well as the property of all public service or public utility corporations. All other ad valorem assessments are made locally by counties under § 40-8-4, Code of Alabama 1975. (1978 Ala. Acts, 2nd Ex. Sess., No. 46, p. 1724 § 3). Section 40-21-1 does not establish the ratio to market value at which the property of a particular taxpayer will be assessed, but it simply pro-

vides that such property will be assessed centrally by the State instead of locally by counties wherein the property may be located. The obvious reason for the central assessment is that the property runs across county lines.

Until 1972 central assessment was of no significance in determining a taxpayer's ad valorem tax liability, but rather was primarily a matter of convenience. In 1972 the passage of Alabama Constiutional amendment 325, amending § 217 of the Alabama Constitution, provided for the division of all taxable property into three classes for purposes of ad valorem taxation. The divisions for taxation were as follows: "Class I. All property of utilities used in the business of such utilities. Class II. All property not otherwise classified. Class III. All agricultural, forest and residential property." Different ratios of assessment apply to each class: "Class I. 30 per centum, Class II. 25 per centum, Class III. 15 per centum."

In 1973 the legislature amended § 40-8-1 of the Code of Alabama 1975, to implement the provisions of amendment 325. Section 40-8-1, as amended, provided a definition of the classifications of property. Section 40-8-1 (b) (1) defines property of utilities to be, "[a]ll property assessed for taxation by the Department of Revenue pursuant to the provisions of [§ 40-21-1]." Oil pipelines traditionally taxed under § 40-21-1 continued to be taxed under this section. The rate of taxation assessed against oil pipelines became thirty percent (30%) as provided for property of utilities in § 40-8-1.

In 1978 amendment 373 was ratified. This amendment superseded amendment 325 and further amended § 217. Amendment 325 created four classes of property for purposes of ad valorem taxation rather than three classes. The property of utilities remained classified under Class I at the highest assessment rate of thirty percent (30%). Section 40-8-1 was again amended to reflect the changes made by amendment 373.

The trial court held that Colonial's property could not be assessed as Class I property under the authority of amendment 373, unless Colonial is found to be a utility as defined by Alabama law. Both appellant and appellee in brief offer various

definitions and criteria to determine what constitutes a utility; however, such is unnecessary, for we consider a constitutionally adequate definition is provided in § 40-8-1 (b) (1).

Section 40-8-1 (b) (1) defines property of utilities as "[a]ll property assessed for taxation by the department of revenue pursuant to the provisions of Chapter 21 of this title." Section 40-21-1 provides that it is the duty of the department "to assess for taxation all property of all . . . *pipelines for transporting or furnishing natural, manufactured or by-product, gas, water, oil, gasoline or other commodities of commerce. . . .*" (Emphasis supplied.) Section 40-21-1, since its enactment in 1935, has been Article 1 of Chapter 21, entitled "Public Utilities" of the Alabama Code. Section 40-21-50 begins Article 2 of Chapter 21 of the Code of Alabama 1975. That section provides for license taxes and begins, "For each person operating a *public utility, such as* a street railroad . . . pipeline company for transporting or carrying gas, oil, gasoline, water or other commodities, ..." (Emphasis supplied.) These furnish certain evidence that the legislature intended that an operation such as Colonial's be identified as a public utility.

Colonial contends that it is not a public utility because it is not subject to the utility gross receipts tax. That contention loses its force upon an examination of the terms and definitions of the legislation by which the tax was enacted. It is obvious that for the purpose of the utility gross-receipts tax, the legislature further refined the classification of public utilities. Section 40-21-80 is a definition section. It provides:

> "(a) For the purpose of this article, the following terms shall have the respective meanings ascribed by this Section:
>
> . . . .
>
> "(7) Utility. Every person regularly engaged in furnishing Utility services to another person or other persons in the State of Alabama.
>
> "(8) Utility Services. Electricity, domestic water, natural gas, telegraph services and telephone services to subscribers. . . ."

It requires little logic to recognize that the legislature deter-

mined that certain public utilities engaged in furnishing subscriber services to persons within the state would be taxed upon the gross receipts from such services. Other public utilities such as pipelines engaged in interstate commerce would not be included for many obvious reasons. However, such failure to tax does not limit the general classification of public utility used in licensing and ad valorem tax statutes. Such distinctions in classification for taxing purposes are within the broad powers of a legislature and are presumed valid under the constitution. *Howell v. Malone*, 388 So. 2d 908 (Ala. 1980); *Miller v. State*, 349 So. 2d 129 (Ala. 1977); *Belcher v. McKinney*, 333 So. 2d 136 (Ala. 1976).

The trial court found that the statutory definition contained in § 40-8-1 violates amendment 373 which defines Class I property as "all property of utilities used in the business of such utilities." The court reasoned that since amendment 373 merely refers to all property of utilities without further elaboration, the statutory definition of utilities contained in § 40-8-1 is overly broad and therefore invalid. We do not find the statute overly broad.

Colonial shares common characteristics of a utility so that statutorily classifying it as a utility is not unreasonable. For example, Colonial has the right of eminent domain in Alabama. See §§ 10-5-1, -4, -8, Code of Alabama 1975. The evidence established that Colonial is regulated by the Federal Energy Regulatory Commission (FERC). The tariffs which it charges its customers must be filed with the FERC and are subject to the Commission's approval. In addition, the rates or tariffs allowed to be charged by Colonial must be filed with the FERC and are subject to the Commission's approval. The evidence further indicated that the rates or tariffs allowed to be charged by Colonial are based on the valuation of the property of Colonial by the FERC. One of Colonial's witnesses testified to a ten percent (10%) return on equity allowed by the FERC to Colonial based upon its valuation of Colonial's property. Further testimony established that the FERC requires Colonial to transport goods for any person meeting the mini-

mum standards set by the FERC with regard to batch sizes. Colonial is not regulated by the Alabama Public Service Commission, because Colonial is engaged strictly in interstate commerce, which is outside the domain of the Alabama Public Service Commission. *See* § 37-2-1, Code of Alabama 1975.

The Department further contends that the trial court erred in finding that the treatment of oil pipeline property as Class I property of utilities for ad valorem tax purposes violates the equal protection clauses of the United States Constitution and Alabama Constitution of 1901. State legislatures are presumed to have acted within their constitutional power in passing laws, even though in practice their laws result in some inequality. *Howell v. Malone, supra.* Moreover, a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it. *Id.* The equal protection clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526 (1959).

In order for a state taxing classification to withstand a challenge on constitutional grounds under the equal protection clause, there must be a "rational basis" for the possible discriminatory effect of that tax. The trial court determined that there was no rational basis for treating the property of buslines, trucklines, airlines or water carriers differently from that of Colonial. The Alabama Supreme Court in *Gideon v. Alabama State Ethics Commission,* 379 So. 2d 570 (Ala. 1980), *citing Buckley v. Valeo,* 424 U.S. 1 (1976), stated that under the rational basis test a court must inquire (a) whether the classification furthers a proper governmental purpose, and (b) whether the classification is rationally related to that purpose.

In determining whether there is a proper governmental purpose,

> "A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot

> assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of the facts which afford a reasonable basis for its action."

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510 (1937). The Alabama Supreme Court has adopted essentially the same rule, for it stated "[M]uch must be left to the discretion of the Legislature, for exact equality of taxation can never be reached." *Woco Pep Co. of Montgomery v. Montgomery*, 213 Ala. 452, 457, 105 So. 214, 219 (1925). "So long as the burden falls with equal weight upon every member of a given class," it is difficult to argue that a tax violates the equal protection provisions of either the state or federal constitution. *Id.*

"A state law is not arbitrary though it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution." *Kahn v. Shevin*, 416 U.S. 351, 355 (1974), *quoting Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1959).

After examining the law and the findings of the trial court, we conclude that the trial court erred in finding that the state had no rational basis for its decision to include oil pipelines in § 40-21-1, characterizing them as utilities for purposes of ad valorem taxation. If there may be some discrimination against Colonial, it is not arbitrary or unreasonable. Until the state was specifically forbidden to tax the property of railroads at a higher assessment ratio than other commercial and industrial property by Congress in 49 U.S.C.A. § 11503, it classified the property of railroads as Class I property. Moreover, until forbidden to do so by the Circuit Court of Montgomery County in *Delta Airlines v. Department of Revenue*, Civil Action No. CV-80-116-G, the Department classified the property of airlines as utilities and taxed them as Class I property. The Tax Equity & Fiscal Responsibility Act of 1982 § 532 amending 49 U.S.C. § 1513(b) and (d), now has the effect of forbidding the state from assessing property of air carriers at a higher rate than other commercial and industrial property.

Currently, the state is specifically forbidden to classify the property of motor carriers as Class I property by 49 U.S.C.A. § 11503a, which gives the motor carriers the same protection from high assessment rates that is afforded railroads and air carriers. Were it not for the supremacy of federal statutes over state law, airlines, trucklines and railroads, which are included in § 40-21-1, would be subject to the same Class I classification as is assigned Colonial's property. The preemption for tax purposes of those other entities does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong.

We stated in *Metropolitan Life Insurance Co. v. Forrester,* 437 So. 2d 535, 538 (Ala. Civ. App. 1983), "The law is clear that the party attacking a statute has the burden of overcoming the presumption of constitutionality and must negate every conceivable or reasonable basis which might support the classification." In this case Colonial has not met its burden. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies which are elected to pass laws." *Howell v. Malone, supra, quoting, Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963). We find no violation of the equal protection clause of either the state or federal Constitution.

For error in the application of law to the facts, the order of the court below is reversed, and the case is remanded for entry of judgment in favor of the Department of Revenue.

REVERSED AND REMANDED.

BRADLEY and HOLMES, JJ., Concur.

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

COLONIAL PIPELINE COMPANY, a corporation,	)	
Appellant,	)	
v.	)	No. CV-82-978
STATE OF ALABAMA,	)	
Appellee.	)	

STIPULATION OF FACTS

Comes now the parties to the above-styled cause, Colonial Pipeline Company, a corporation ("Appellant"), and the State of Alabama ("Appellee"), acting by and through their attorneys of record and stipulate to the Court as follows:

1. The parties are correctly identified in the Complaint. Appellant properly effected this appeal, timely filed its Notice of Appeal, Cost Bond, Supersedeas Bond and Complaint with the Clerk of the Circuit Court of Montgomery County, Alabama, and this appeal is properly before the Circuit Court of Montgomery County, Alabama.

2. The Alabama Department of Revenue has asesssed Appellant's property which is subject to ad valorem tax in the State of Alabama for tax year 1982 in the amount of $22,800,000, which reflects the use of a 30% assessment factor applied to 90% of the fair market value of Appellant's property based on the characterization of Appellant's property by Appellee as Class I property, property of utilities. The fair market value of Appellant's property, as determined by the Department is not at issue in this appeal, the sole issue being whether Appellant's property is properly assessed at a rate of 30% as Class I property as claimed by Appellee, or whether

such property should be assessed at a rate of 20%, as Class II property as claimed by Appellant.

3. Appellant is engaged in the interstate transportation of refined petroleum products by pipeline to and through the State of Alabama, among other points in a 14-state region. Appellant's property subject to ad valorem tax in the State of Alabama consists primarily of pipelines and operating tankage, all being dedicated to, and used solely and exclusively in, interstate commerce.

4. Appellant is a common carrier subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") pursuant to 42 U.S.C. § 7172(b). However, FERC does not possess any regulatory authority over Appellant with respect to the acquisition of existing petroleum pipelines, the construction of new petroleum pipelines or the cessation of use of petroleum pipelines.

5. Appellee has never asserted the application of the public utility license tax imposed by § 40-21-50 of the *Code of Alabama* (1975), the utility gross receipts tax imposed by § 40-21-80 of the *Code of Alabama* (1975) or the utility service use tax imposed by § 40-21-100 of the *Code of Alabama* (1975), with respect to Appellant; nor has the Alabama Public Service Commission ever asserted jurisdiction over Appellant pursuant to either § 37-2-1 *et seq.* or § 37-4-1 *et seq.* of the *Code of Alabama* (1975), or any other provision of the statutes of the State of Alabama.

6. Petroleum pipelines, and a single barge line, constitute the only "common carriers", as that term is defined by 49 U.S.C. § 10102(4), the property of which is classified by the Appellee as "Class I property" under § 40-8-1(a) of the *Code of Alabama* (1975).

7. Either party may introduce further testimony or documentary evidence on the trial of this cause.

/s/ N. LEE COOPER

N. Lee Cooper
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL

Attorney for Appellant,
Colonial Pipeline Company

/s/ RON BOWDEN

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Assistant Attorney General
State of Alabama
and Assistant Counsel,
Department of Revenue

Attorney for Appellee,
State of Alabama

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

COLONIAL PIPELINE COMPANY, a corporation,	)	
Appellant,	)	
v.	)	No. CV-82-978-G
STATE OF ALABAMA,	)	
Appellee.	)	

ORDER

Appellant, Colonial Pipeline Company ("Colonial"), has appealed from the final assessment of ad valorem tax made and fixed against it by the Alabama Department of Revenue[1] (the "Department") on June 21, 1982. The sole issue in this case is whether Colonial's property is properly assessed at a ratio of 30 percent of market value as Class I property as claimed by the Department, or whether such property should be assessed at a ratio of 20 percent of market value as Class II property as claimed by Colonial. Colonial bases its contention that this property should be assessed as Class II property at a ratio of 20 percent of market value, on principles of statutory construction and on the Alabama and United States Constitutions.

For the reasons hereafter set forth, this Court holds that the assessment of Colonial's property at a ratio of 30 percent of market value as the property of a utility (Class I property) is violative of Amendment 373 of the Alabama Constitution and the Equal Protection Provisions of the Alabama and United

[1]Although the named Appellee in this case is the State of Alabama, the Alabama Department of Revenue administers the ad valorem tax at issue in this case and all future references in this Order shall be to the Department, rather than the State of Alabama.

States Constitutions. Consequently the Department's assessment of ad valorem tax must be reversed, and the Department is directed to assess Colonial's property as Class II property at a ratio of 20 percent of market value.

A. *Findings of Fact*

1. *History of Alabama's Constitutional and Statutory Provisions.*

In 1935, the Alabama Legislature enacted the predecessor[2] of what is now § 40-21-1 of the *Code of Alabama* 1975. Section 40-21-1[3] provides that the Department shall assess for taxation the property of various taxpayers, including the property of pipelines transporting oil, gasoline or other commodities of commerce, as well as the property of all public service or public utility corporations. The section does not set, or attempt to set, the ratio to market value at which the property of a particular taxpayer will be assessed for ad valorem tax purposes. The section simply provides that the property of such taxpayers

[2]Ala. Acts No. 194, § 105, at 256, 310 (1935).

[3]§ 40-21.1. Department of revenue to assess all property; applicability of chapter.

It shall be the duty of the department of revenue to assess for taxation all property of all railroad companies, street and suburban railroad companies or persons or companies operating railroad or street railroads, or suburban railroads or sleeping cars in this state; all express companies, including railroad companies doing an express business and all telephone and long distance telephone and all telegraph business; all persons, firms or corporations doing a gas business, transporting gas or furnishing gas, natural, manufactured or by-product, in or through pipes or in drums, tubes, cylinders or by any other method; all water, electric light or power, hydroelectric power companies, steam heat, refrigerated air, dockage or cranage, toll roads, toll ferries, toll bridges, railroad equipment or navigation companies, pipelines for transporting or furnishing natural, manufactured or by-product gas, water, oil, gasoline or other commodities of commerce and the property of all public service or public utility corporations, and all property not required by law to be listed for taxation with the county tax assessor; and the owner, president, general manager, agent, trustee, receiver or other person or persons having control of the company's affairs in this state shall make returns of all property of said company located in this state to the department of revenue.

will be centrally assessed by the Department, rather than being locally assessed by the tax assessors of the various counties. At the time of its enactment, the purpose of § 40-21-1 was to provide a convenient, uniform and fair assessment of the property of taxpayers engaged in multi-county and multi-state operations, and the Department acknowledges that § 40-21-1 was not a taxing statute. The Department readily admits that § 40-21-1 requires the central assessment of both utility and non-utility taxpayers.

Until 1972, central assessment, as opposed to local assessment, was of no significance in determining a taxpayer's ad valorem tax liability. Central assessment was primarily a matter of convenience for both the Department and the taxpayers. Although the property was assessed by the Department, the tax was paid directly to the counties based on an apportionment of the assessed property values among the appropriate counties by the Department. The ratio of assessed value to market value for property which was centrally assessed was exactly equal to the ratio of the assessed value to market value for property which was locally assessed. The rate of tax was likewise the same for centrally assessed property and locally assessed property. This uniformity of taxation for all property was required by Sections 211 and 217 of the Alabama Constitution.

In 1972, however, Section 217 of the Alabama Constitution was amended by the passage of Amendment 325. Amendment 325 provided for the division of all taxable property within the State of Alabama into three classes for the purposes of ad valorem taxation. The amendment further provided differing ratios of assessment to be applied to each of the three classes of property. In pertinent part, Amendment 325 provided as follows:

> (a) All taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:
>
> Class I. All property of utilities used in the business of such utilities.
>
> Class II. All property not otherwise classified.

> Class III. All agricultural, forest and residential property.
>
> (b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value of such property:
>
> Class I. 30 per centum
> Class II. 25 per centum
> Class III. 15 per centum
>
> (c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authority, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes of property defined in paragraph (a) herein and at the same ratios of assessed value to the fair and reasonable market value thereof as fixed in paragraph (b) herein. . . .

Although the adoption of Amendment 325 brought to an end the requirement of absolute uniformity in the taxation of all property, the uniform taxation of all property within the same class was still required by the Alabama and United States Constitutions.

The clear and unambiguous language of Amendment 325 provided that Class I property consisted only of "property of utilities used in the business of such utilities." The constitutional amendment did not designate which taxpayers constituted utilities, nor did it define "property of utilities." However, in 1973, the Alabama Legislature enacted § 40-8-1 of the *Code of Alabama* 1975 purporting to implement the provisions of Amendment 325. In defining Class I property, § 40-8-1 (a) merely tracks the language of the constitutional amendment and defines Class I property as "property of utilities used in the business of such utilities." Section 40-8-1 (b) (1), however, defines the "property of utilities" as "[a]ll property assessed for taxation by the department of revenue pursuant to the provisions of [§ 40-21-1]." Consequently, § 40-21-1 was converted

from a statute designed to promote uniformity and fairness in the taxation of property, to a taxing statute by reference only.

As stated, § 40-21-1 requires the central assessment of the property of numerous taxpayers which are not utilities. Therefore, the property of numerous non-utilities is presently being assessed as Class I property, rather than as Class II property, in direct contradiction to the Alabama Constitution. Despite this fact, the Department has done nothing to assess as Class I property only the property of those taxpayers which are centrally assessed and which are also utilities. The Department has taken the position that if a taxpayer is centrally assessed under § 40-21-1, its property constitutes Class I property whether or not the taxpayer is a utility. This position has been taken by the Department despite the clear language of Amendment 325 which defined Class I property solely as the "property of utilities used in the business of such utilities."

Section 217 of the Alabama Constitution was further amended in 1978 by the passage of Amendment 373. As a result of Amendment 373 to the Alabama Constitution, there are now four classes of property, rather than three classes. Class I property is still defined as the "property of utilities used in the business of such utilities", and is still to be assessed at a ratio of 30 percent of market value. Class II property retains its definition as "[a]ll property not otherwise classified", but it is now assessed at a ratio of only 20 percent of market value.[4]

After the adoption of Amendment 325 in 1972 and the enactment of implementing legislation, Colonial, as well as other

[4]The third and fourth classifications established by Amendment 373 are as follows:

> Class III. All agricultural, forest and single-family owner-occupied residential property, and historic buildings and sites.
>
> Class IV. All private passenger automobiles and motor trucks of the type commonly known as "pickups" or "pickup trucks" owned and operated by an individual for personal or private use and not for hire, rent or compensation.

Class III property is to be assessed at a ratio of 10 percent of market value, and Class IV is to be assessed at a ratio of 15 percent of market value.

non-utility taxpayers which were centrally assessed by the Department, had their property assessed at 30 percent of market value as Class I property, rather than at 25 percent of market value as Class II property. Consequently, these non-utility taxpayers paid ad valorem tax equal to 120 percent of the amount they would have paid if their property had been assessed as Class II commercial property.

In 1978, however, the burden of being taxed as a utility became much greater. After the adoption of Amendment 373, the property of utilities was still assessed at a ratio of 30 percent of market value as Class I property, but other commercial property was assessed at a reduced ratio of only 20 percent of market value as Class II property. As a result, the property of non-utilities which was centrally assessed was effectively taxed at a rate equal to 150 percent of the rate imposed on the property of non-utilities which was locally assessed.

2. *Description of Colonial.*

Colonial is engaged in the interstate transportation of refined petroleum products by pipeline to and through the State of Alabama, among other points, in a 14-state region. The property of Colonial which is subject to ad valorem tax in the State of Alabama consists primarily of pipelines and operating tankage, all being dedicated to, and used solely and exclusively in, interstate commerce. Colonial does not own any of the refined petroleum products which it transports through its pipelines, nor does Colonial sell any refined petroleum products for its own account or for the account of others. Therefore, Colonial is a transportation company merely providing one alternative mode of transporting petroleum products.

Colonial's pipeline system begins in the Houston, Texas area and terminates in the New York City metropolitan area. Approximately two percent of the total refined petroleum products transported by Colonial are delivered to points in the State of Alabama, but no product in the Colonial system originates in Alabama. Refined petroleum products delivered by Colonial to Alabama constituted 28.6 percent of the total refined petroleum product utilized in Alabama during 1980, and 34.3

percent of the product utilized in Alabama during 1981. The remaining percentage of refined petroleum products utilized in Alabama was delivered by modes of transportation in competition with Colonial.

3. *Colonial is Not Treated as a Utility by Any Other Alabama Statute.*

Colonial does not pay, nor has the Department sought to impose, the public utility license tax imposed by § 40-21-50 of the *Code of Alabama* 1975, the utility gross receipts tax imposed by § 40-21-80 of the *Code of Alabama* 1975, or the utility service use tax imposed by § 40-21-100 of the *Code of Alabama* 1975. Moreover, the Alabama Public Service Commission has never asserted jurisdiction over Colonial pursuant to either § 37-2-1 *et seq.* or § 37-4-1 *et seq.* of the *Code of Alabama* 1975, or any other provision of the statutes of the State of Alabama.

4. *Colonial is Not Subject to "Utility" Type Regulation by any Federal Agency.*

Commencing with the passage of the Hepburn Act in 1906, common carrier pipelines transporting crude oil and refined petroleum products have been subject to federal regulation. The regulation of both crude oil and product pipelines is substantially identical; therefore, future reference will be made to them jointly as "oil pipelines." The Interstate Commerce Commission ("ICC") exercised jurisdiction over oil pipelines from 1906 to 1978, at which time jurisdiction was transferred to the Federal Energy Regulatory Commission ("FERC"). The purpose of the 1906 regulation of oil pipelines was to assure independent producers and refiners of petroleum fair access to the pipelines owned by integrated oil companies, such as Standard Oil. The focus of oil pipeline regulation has not been the protection of the consumer of petroleum products which is in marked contrast with the focus of the regulation imposed on utilities, such as electric and telephone companies. It is noted that the ultimate consumer is affected very little by the transportation rates charged by oil pipelines. Typically, the cost of transporting gasoline by pipeline ranges from approximately one to two cents a gallon, or roughly one to two percent of the

price of gasoline at the pump. Therefore, oil pipeline charges do not have a significant impact on consumers.

The 1906 statute requires that oil pipeline rates be just and reasonable, and forbade undue preference and prejudice between shippers of petroleum products in the utilization of the pipelines. However, there has never been any federal control over "entry" into the oil pipeline business, either for the movement of crude oil or refined product. Therefore, an oil pipeline has absolutely no regulatory protection from competition by newly-constructed pipelines since a new, competing pipeline can be constructed without the necessity of any regulatory approval. Likewise, there is no federal regulation on the "exit" or termination of an oil pipeline. That is, an oil pipeline can terminate services, in whole or in part, without receiving any regulatory approval.

While the 1906 statute requires that oil pipeline rates be "just and reasonable", neither the ICC nor FERC has been disposed to examine such rates pipeline-by-pipeline, point-to-point. Instead, they have left the setting of rates to competition and bargaining between the pipeline operators and their commercial customers. The regulators have set overall industry maximum rates of return, but have refrained from becoming involved in the details of specific pipeline rates. This low-level involvement in the regulation of oil pipeline rates is to be contrasted with the rate regulation imposed on utilities, such as electric and telephone companies. When an electric or telephone company proposes a change in its rates, its application is examined in depth and usually made the subject of hearings at which the cost of service is probed, customer class by customer class, and rate levels and rate relationships are reviewed. In short, utility rate regulation is meticulously detailed and repetitive from case to case, as contrasted to the almost non-existent rate regulation of oil pipelines.

The regulation of utility rates must necessarily focus on the ultimate consumer of the utility service because this regulation is the only protection the consumer has from the monopolistic

status of the utility. However, in exchange for this extensive rate regulation, utilities are guaranteed a certain rate of return on their investment. On the other hand, consumers of refined petroleum products need no protection from the rates charged by oil pipelines because the pipelines do not enjoy monopolistic status nor are they guaranteed a certain rate of return on their investment.

Within the broad industry guidelines set by the ICC, and now FERC, oil pipelines set their rates just as any other business. Rates are based on the cost of providing the transportation service, return on investment and competitive restraints. Once rates have been established, they are published in a tariff which is filed with FERC. These rates go into effect automatically unless a formal complaint is filed with FERC with respect to such rates. Harry B. Greene, Administrator-Property Tax of Colonial, testified that there has never been a shipper complaint filed with either the ICC or FERC with respect to a Colonial rate. He further testified that all Colonial rates have been allowed to go into effect without a formal hearing and without change.

Regulation in and of itself is not determinative of utility status. Only certain types of regulation are common to public utilities. Utility regulation is designed to protect the ultimate consumer through detailed regulation of rates and required approval of the utility's entry into or exit from a market area. In short, utility regulation is a substitute for competition. The regulation of utilities must be accompanied by certain rights and privileges bestowed upon the utility. Utilities, for example, are protected from competition and are at least granted quasi-monopoly status. Conversely, the regulation of oil pipeline rates is minimal, and oil pipelines are not subject to entry or exit regulation. Oil pipelines are not granted any monopolistic position with respect to their service area, nor are they protected in any way from competition by other pipelines or other transportation modes.

Although oil pipelines were granted the ability to acquire

right-of-way by condemnation in Alabama in 1973,[5] Colonial has never utilized, nor sought to utilize, this right. Colonial acquired all of its right-of-way in the State of Alabama through negotiation. The existence of this *unused* right which is equally applicable to any non-utility maintaining any work of internal improvement is certainly not determinative of utility status.

As stated by FERC in its *Williams* decision, the regulation of oil pipelines is "not public utility regulation."[6] This Court also finds that the regulation of oil pipelines does not constitute utility regulation.

5. *Colonial is Subject to Intense Competition.*

As stated, oil pipelines are not granted a monopolistic position with respect to their service areas and are not protected from competition. The classic example of the competition to which oil pipelines are subject is the competition between Colonial and Plantation Pipe Line Company ("Plantation"), which operate parallel product pipelines from the Gulf Coast to the Eastern Seaboard. During the 1950's Plantation exclusively served this route. However, following the completion of the larger, more-efficient Colonial system in the early 1960's, Plantation was forced both to reduce its rates and to expand capacity to remain competitive. Although Colonial's rates were uniformly lower than Plantation's when the Colonial system was first built and remained that way for a number of years, at present the point-to-point rates of Plantation are oftentimes lower than Colonial's rates. This is a prime example of the effect of competition on oil pipeline rates by another common carrier which is free to enter the market at any point without regulatory approval.

In addition to head-to-head competition from other pipelines, Colonial also faces competition from alternative sources of supply of a petroleum product for its market area and from crude oil pipelines. Moreover, Colonial faces substantial inter-

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[5]Ala. Acts No. 1063, § 2, at 1777, (1973), codified as ALA. CODE § 10-5-4 (1975).

[6]*Williams Pipe Line Company*, FERC Opinion 154, at 351 (unpublished opinion of FERC dated November 30, 1982).

modal competition from coastal tankers and intercoastal barges. The distribution of petroleum products transported through the Colonial system via distribution pipelines is also subject to substantial competition from trucklines. It is noted that none of Colonial's intermodal competitors are utilities, and none are taxed as such by the Department.

6. *Comparison of Colonial's Regulation With the Regulation of Other Carriers.*

Prior to 1980, railroads were intensely and broadly regulated by the ICC. With the enactment of the Staggers Act in 1980, some deregulation of railroads is now taking place; however, a substantial degree of regulation remains. The ICC retains control over a railroad's entry into or exit from a particular market area. The ICC also must approve the acquisition or merger of railroads. In addition, the ICC has remained very active in the regulation of railroad rates even after partial deregulation.

As the result of the Motor Carrier Act of 1980, the trucking industry has moved toward reduced or "revised" regulation, to be distinguished from deregulation. ICC control over entry into new markets was eased, but permission is still required, and the ICC must make specific case-by-case findings as to the impact of a grant of new authority on existing carriers. Likewise, ICC control over the abandonment or exit from a market has been eased, but its authority still remains. A zone of freedom has been established for the trucking industry within which rate changes may be made free from regulation; however, outside this zone, rates remain subject to ICC regulation.

Prior to September, 1982, the regulation of interstate buslines was very extensive. The Bus Regulatory Reform Act of 1982 sought to place greater reliance on competition and bring about reduced regulation, as distinct from deregulation. The applicable entry or exit standards were eased, but ICC approval is still required in order to enter a new market or exit from an existing market. As with the trucking industry, bus carriers have been given a zone of freedom within which they may set rates free from regulation; however, outside this zone, rates are still subject to regulation.

The ICC has exercised broad regulatory authority over common carrier barge service since 1940. This regulation remains essentially unchanged to date.

The deregulation of air transportation for both passenger and cargo service clearly has gone further than that of the rail, truck, bus or water carrier industries. Control over entry and exit has now been eliminated for practical purposes. The airlines also are now free to set rates as they wish. In many respects, the regulatory posture of air transportation has now been placed on a par with that which has long been characteristic of the oil pipelines, i.e. competition is now relied upon rather than regulation of entry, exit and rates. However, airlines are still not quite as free from regulation as oil pipelines. The Federal Aviation Administration continues to control the number of permissible operations, i.e. arrivals and departures, at major airports. Therefore, even though an airline is free to begin service to a new market area, if there is insufficient capacity at the airport serving that area, the airline cannot commence service.

7. *Colonial Is Not Required to Serve the Public to Any Greater Extent Than Other Common Carriers.*

This Court finds that Colonial is under no greater obligation to serve the public than are other common carriers. In fact, due to the "batching" requirements of Colonial,[7] it serves a very limited "public" which is not indicative of utility status.

8. *There is No Reasonable Distinction Between Oil Pipelines and Other Common Carriers Upon Which to Base the Different Tax Treatment.*

Oil pipelines, together with a *single* barge company, are the only common carriers the property of which is assessed by the Department as Class I property. The sole reason advanced by the Department for the different treatment of these taxpayers and other common carriers such as trucklines, buslines or air-

[7]A prospective shipper on the Colonial system must tender a minimum batch of 75,000 barrels of segregated product or 25,000 barrels of integrated product in order to utilize the Colonial system. In 1981, Colonial served only 60 shippers of refined petroleum product.

lines, is that the property of pipelines and bargelines is centrally assessed by the Department because of their enumeration in § 40-21-1, whereas, the property of the other common carriers[8] is not centrally assessed by the Department. Mr. Barber has testified that oil pipelines are less regulated than railroads, trucklines and buslines, even after the deregulation of these carriers. Further, Mr. Barber testified that oil pipelines are no more regulated than airlines after their deregulation, and are probably less regulated due to the airport capacity regulation of the Federal Aviation Administration. The Court finds that there is no rational basis, nor any rational distinction related to the utility classification, which would justify treating an oil pipeline differently for tax purposes than any other kind of common carrier transportation company.

B. *Conclusions of Law*

1. *Colonial Is Not A Utility.*

Amendment 373 of the Alabama Constitution requires the division of property into four classes for purposes of ad valorem taxation, with the property falling into the several classes assessed at varying ratios of market value. Class I property consists of "[a]ll property of utilities used in the business of such utilities." The Department has assessed Colonial's property as Class I property because such property is centrally assessed. The Department has not made a determination whether or not Colonial is a utility. This Court holds that as a matter of statutory construction, Colonial's property cannot be assessed as Class I property under the authority of Amendment 373 unless Colonial is a utility, as that term is defined by Alabama law.

The Alabama Constitution does not define "utility", as it applies to ad valorem taxation. Although the Alabama Legis-

[8]This Court held in *Delta Airlines, Inc. v. State,* CV-80-1163-G (1981), that the property of airlines could not be assessed constitutionally as Class I property, and must be assessed as Class II property. Although airlines are not specifically listed in § 40-21-1 and their property does not constitute Class I property, the property of airlines is still centrally assessed per agreement between the respective airlines and the Department.

lature attempted to define the term "all property of utilities", this definition cannot be utilized to define "utility" because by the Department's admission it includes numerous taxpayers which are not utilities. Therefore, this Court must look beyond the Constitution and statutes of Alabama to find an adequate definition of "utility."

The United States Supreme Court has defined a utility as a business

> affected with a public interest; that a business so affected is one in which property is devoted to an enterprise of a sort which the public itself might appropriately undertake, or *one whose owner relies on a public grant or franchise for the right to conduct the business,* or in which he is bound to serve all who apply; in short, such as is commonly called a public utility; or *a business in its nature a monopoly.*
>
> *Nebbia v. New York,* 291 U.S. 502, 531 (1934) (emphasis added)

The Alabama courts also have been called upon to determine which businesses are so affected with a public interest so as to be deemed a utility. From these cases, it is discovered that there are two utility characteristics which *must exist* before a particular business can be held a utility. First, the utility must serve all members of the public fairly and without discrimination. Second, the business must be subjected to extensive governmental regulation with respect to its operations and rates, in exchange for which the business is bestowed certain rights or privileges. *Miller v. Hillview Water Works Project, Inc.,* 273 Ala. 267, 139 So. 2d 337 (1962); *Birmingham Ry. Light & Power Co. v. Littleton,* 201 Ala. 141, 77 So. 565 (1917) (on rehearing); *Delta Air Lines, Inc. v. State,* In the Circuit Court of Montgomery County, Alabama, CV-80-1163-G (1981). In addition to these necessary characteristics, there are several other factors which may have a bearing on utility status in a particular case. Two such additional factors are regulation by the Alabama Public Service Commission and the imposition of the various utility taxes imposed by Chapter 21 of Title 40, *Code of Alabama* 1975.

Colonial is required to serve its shippers without "undue preference and prejudice." However, this obligation is certainly no greater than the requirement of nondiscrimination imposed on other common carriers which are not utilities such as trucklines, buslines and airlines. In addition, it can hardly be said that Colonial is serving the "public" when it served only 60 shippers in 1981.

Furthermore, the regulation of Colonial by FERC does not constitute utility regulation. Colonial is not subject to any entry or exit regulation, and its rate regulation merely takes the form of overall industry maximum rates of return. In reality, its rates are determined by market forces, not by regulation. Colonial is not protected from competition nor granted monopoly or quasi-monopoly status. Although oil pipelines are now granted the ability to acquire right-of-way by condemnation in Alabama, Colonial has never utilized this right which is no different than the right granted to any non-utility maintaining any work for internal improvement. Colonial is not regulated by the Alabama Public Service Commission, nor does it pay the utility license tax, gross receipts tax or service use tax.

Based on the above comparison of Colonial's operations and regulation to the utility characteristics previously established by the Alabama courts, this Court is compelled to hold that Colonial is not a utility. It is noted that this determination is entirely consistent with the determination by FERC that oil pipelines, as an industry, are not utilities.[9]

2. *Section 40-8-1 Is Overbroad as Applied to Colonial.*

Class I property is defined by the Alabama Constitution as "[a]ll property of utilities used in the business of such utilities." The phrase "all property of utilities" is not defined in the Constitution, but the Alabama Legislature has attempted to supply a definition. Section 40-8-1 (b) (1) defines "all property of utilities" as "[a]ll property assessed for taxation by the department of revenue pursuant to the provisions of [§ 40-21-1]."

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[9]*Williams Pipe Line, supra* at 370, n. 546 ("Oil pipeline companies are not 'utilities.' ")

Listed in § 40-21-1 are several different types of companies including pipelines for transporting oil, gasoline or other commodities of commerce. In *State v. Alabama Power Co.*, 254 Ala. 327, 48 So. 2d 445 (1950), the Alabama Supreme Court explained the purpose of this statute:

> In this case the properties of appellee are located in every county in the state except ten. They are, however, integrated into one operating system or unit. It is necessary therefore to ascertain the value of the entire system or operating unit and then allocate that to the various counties in which parts of its property are located. It often happens in the case of railroads that their properties lie in several states and yet all are integrated into one operating unit. In such a situation it is necessary to ascertain the value of the entire system and then allocate to Alabama its proportional share and within the state allocate to the various counties the value of properties in such counties. For these reasons the legislature provided that the department of revenue which has the personnel and machinery for doing this work be required to ascertain the assessed value . . . , and then pro rate it.
>
> 254 Ala. at 339, 48 So. 2d at 455.

This statute was enacted prior to the amendment of the Alabama Constitution providing for the division of property into classes for ad valorem taxation purposes and thus cannot be read as describing a class of property. In fact, in *State v. Alabama Power Co.*, the Alabama Supreme Court rejected an attempt by the Department to transform this purely administrative provision into a classification statute.

Simply stated, the Legislature has attempted to provide a detailed definition of a phrase used in the Alabama Constitution generally descriptive of a class of property by incorporating by reference a long-standing statutory provision the purpose of which has no relation to the classification scheme now mandated by the Constitution. As a result, the property of Colonial which, as this Court has found, is clearly not a utility is classified as Class I property. The Legislature has distorted the meaning of the phrase used in the Constitution, "all property

of utilities", by including in Class I the property of taxpayers which are clearly not utilities. However, as the Alabama Supreme Court has stated, the Legislature cannot do indirectly what the Constitution prohibits being done directly. *State v. Alabama Power Co., supra.* The definition of "all property of utilities" enacted by the Legislature in § 40-8-1 (b) (1) is, therefore, overbroad.

In the instant case, this Court holds that the property of a taxpayer which is not a utility may not be assessed as utility property simply because it is listed in § 40-21-1 for central assessment by the Department. In determining the effect of our holding that the statute is over-inclusive in defining the constitutional term, this Court is guided by several rules of construction. The first is the principle that one part of a statute may be constitutional, and another part unconstitutional and if the unconstitutional part can be severed from the remainder of the statute the remainder may stand while the unconstitutional part is stricken out. *See Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). A second related principle is that a court should decline to consider the constitutionality of a particular provision if such provision is not involved in the issue before the court and such provision may be separated from the provision that is involved in the litigation. *See Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945).

The only part of § 40-8-1 (b) (1) which must be construed in this case is the inclusion of the property of "pipelines for transporting . . . oil, [and] gasoline" in its definition of "all property of utilities." Applying the above-described principles to the instant case, this Court holds that § 40-8-1 (b) (1) is overbroad to the extent it requires the inclusion of the property of oil pipelines in the definition of "all property of utilities" so as to characterize Colonial's property as Class I property. The characterization of Colonial's property as Class I property is invalid and Colonial's property may not be classified as Class I property.

3. Classification of Colonial's Property as Class I Property Violates the Equal Protection Provisions of the Alabama and United States Constitutions.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> Nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court has interpreted the above-quoted "equal protection clause" to mean that "no person or class of person shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis,* 101 U.S. 22, 25 L.Ed. 989, 992 (1880).

Likewise, Sections 1, 6 and 22 of the Alabama Constitution combine to provide equal protection of the laws. *Black v. Pike County Comm'n,* 360 So. 2d 303 (Ala. 1978); *City of Hueytown v. Jiffy Chek Co.,* 342 So. 2d 761 (Ala. 1977). The Alabama Supreme Court has stated that the essence of equal protection under the Alabama Constitution is that all who are similarly situated must be treated alike and that no one can be subjected to the arbitrary exercise of governmental power. *City of Hueytown v. Jiffy Chek Co., supra.*

It is without question that the guarantee of equal protection applies to the exercise by a state of its taxing powers. These powers are constitutionally limited where the state seeks to impose upon members of a selected class a burden which is not shared by other members of the same class. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison,* 301 U.S. 459 (1937); *State Board of Tax Comm'rs v. Jackson,* 283 U.S. 527 (1931); *McCarthy v. Jones,* 449 F. Supp. 480 (S.D. Ala. 1978). In this regard, the United States Supreme Court has stated as follows:

> [T]he equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, . . . and that it applies to the exercise of all

> the powers of the state which can affect the individual or his property, including the power of taxation.
>
> *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37 (1928)

The guarantee of equal protection applies equally whether the discrimination is "occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918), *quoted in Weissinger v. Boswell*, 330 F. Supp. 615, 622 (M.D. Ala. 1971).

Although a state is presumed to have acted within its constitutional power even though a particular law results in some inequality, there is a point beyond which the state may not go without violating equal protection. The state must proceed upon a rational basis. Any discrimination "must rest upon some ground of difference having a fair and substantial relationship to the object" sought to be accomplished. *Allied Stores v. Bowers*, 358 U.S. 522, 527 (1958). The Alabama Supreme Court likewise has recognized the "rational basis" test. *See Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570 (Ala. 1980).

The discrimination in this case results because the Department has treated the property of Colonial as Class I property of a utility, while treating the property of many other similarly situated and competing taxpayers as Class II commercial property. This Court finds that there is no rational basis for treating the property of Colonial differently for ad valorem tax purposes from the property of interstate buslines, trucklines, airlines or water carriers. The following statement by this Court in *Delta Air Lines, Inc.* concerning airlines, is equally applicable to Colonial.

> This Court finds from the evidence that there is absolutely no rational basis for treating the property of airlines differently for ad valorem tax purposes from the property of interstate buslines, trucklines or water carriers. Both motor and water carriers have always been regulated more extensively than airlines. Today they are less extensively

deregulated than airlines. It is obvious, therefore, that regulation, or the absence of it, cannot possibly justify treating airlines as public utilities and excluding motor and water carriers from such treatment.

The same is true with regard to the requirement that the public be served without discrimination. Buslines are every bit as subject to this requirement as are airlines. Indeed, almost all public accommodation facilities, e.g., hotels, restaurants, amusement facilities, are subject to non-discrimination laws.

Motor, air and water carriers have historically been regulated more extensively than oil pipelines, and this is true even today after the partial deregulation of such carriers. It is obvious, therefore, that regulation, or the absence thereof, cannot possibly justify the treatment of Colonial as a utility, and the exclusion of motor, air and water carriers from such treatment. Likewise, Colonial is under no greater obligation to serve the public than other common carriers which are not taxed as utilities by the Department.

The only justification advanced by the Department for treating Colonial's property differently for ad valorem tax purposes from the property of other common carriers is that § 40-8-1 requires that the Department assess as Class I property the property of all taxpayers which are centrally assessed by the Department under § 40-21-1. This Court held that § 40-8-1 is overbroad, and therefore invalid, with respect to its inclusion of Colonial's property in Class I as the property of a utility. This Court further finds that the central assessment of Colonial's property by the Department, in and of itself, provides absolutely no basis for the difference in its treatment for ad valorem tax purposes than the treatment provided the property of other common carriers. Therefore, the assessment of Colonial's property as Class I property violates the equal protection provisions of the Alabama and United States Constitutions.

On the basis of the foregoing findings of fact and conclusions of law, this Court finds and declares that Colonial's property has heretofore been unlawfully classified as Class I property of a utility within the meaning of Amendment 373, to Section

217, of the Constitution of Alabama. It is therefore, the ORDER, JUDGMENT and DECREE of this Court that the Final Assessment of Ad Valorem Tax made and entered on June 21, 1982, by the Department be, and the same hereby is, reversed, and the Department is directed to assess Colonial's property as Class II property at a ratio of 20 percent of market value.

Both the principal and surety on Colonial's supersedeas bond be, and the same hereby are, released.

All costs of court incurred in this cause be and hereby are taxed against the State of Alabama.

DONE this the 4th day of May, 1983.

/s/ WILLIAM R. GORDON

CIRCUIT JUDGE

IN THE COURT OF CIVIL APPEALS
FOR THE STATE OF ALABAMA

COLONIAL PIPELINE COMPANY, a corporation,	)	
Appellant,	)	CASE NO. CIV. 3824
vs.	)	
STATE OF ALABAMA,	)	
Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Colonial Pipeline Company ("Colonial"), the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Alabama, reversing the Circuit Court's order that reversed the Final Assessment of Ad Valorem Tax made by the Alabama Department of Revenue and from the order of the Supreme Court of the State of Alabama, quashing the writ of certiorari as improvidently granted. The judgment of the Court of Civil Appeals was entered on January 25, 1984. Colonial's timely application for rehearing was denied by the Court of Civil Appeals on February 29, 1984. On May 4, 1984, the Alabama Supreme Court granted Colonial's timely petition for writ of certiorari. On May 10, 1985, the Alabama Supreme Court entered an order quashing the writ of certiorari as improvidently granted.

The Court of Civil Appeals of the State of Alabama is the Court possessed of the record.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ N. Lee Cooper (by LEB, Jr.)

N. Lee Cooper

/s/ Cathy S. Wright

Cathy S. Wright
Counsel for Appellant,
Colonial Pipeline Company

OF COUNSEL:

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1200 Watts Building
Birmingham, AL 35203
(205) 252-2889

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Notice of Appeal to the Supreme Court of the United States has been served on Ron Bowden, Esq., attorney for the State of Alabama, 201 Administrative Building, Montgomery, Alabama 36130, by depositing same in the United States mail, first class postage prepaid and properly addressed this 11th day of July, 1985. I further certify that all parties required to be served have been served.

/s/ Lee E. Bains, Jr.

OF COUNSEL

IN THE SUPREME COURT
FOR THE STATE OF ALABAMA

COLONIAL PIPELINE COMPANY, a corporation,	)	
Appellant,	)	CASE NO. 83-564
vs.	)	
STATE OF ALABAMA,	)	
Appellee.	)	

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/s/ N. Lee Cooper (by LEB, Jr.)
N. Lee Cooper

/s/ Cathy S. Wright
Cathy S. Wright
Counsel for Appellant,
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OF COUNSEL:

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/s/ Lee E. Bains, Jr.
OF COUNSEL

U.S. CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

ALA. CONSTITUTION, SECTION 217:

Sec. 217. Property of private corporations, associations and individuals to be taxed at same rate; exception as to religious, education and charitable property.

The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes.

ALA. CONSTITUTION, AMENDMENT 325:

Amendment No. 325

AMENDMENT OF SECTION 217.

Sec. 217. Classification of taxable property for purposes of ad valorem taxation; taxable property to be taxed by state, counties, municipalities, etc., at same rate; assessment ratios for purposes of ad valorem taxation; increase or decrease of ad valorem tax rate by counties, municipalities, etc.; exemption of state, county and municipal property and property used for religious, educational or charitable purposes from taxation; legislature may provide exemptions from taxation; interpretation of authority for counties, municipalities, etc., to levy taxes, incur indebtedness, etc., in relation to assess-

ment of property; maximum rate of ad valorem tax in any one taxable year.

(a) All taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:

Class I. All property of utilities used in the business of such utilities,

Class II. All property not otherwise classified,

Class III. All agricultural, forest and residential property.

(b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value of such property:

Class I. 30 per centum

Class II. 25 per centum

Class III. 15 per centum

(c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authority, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes of property defined in paragraph (a) herein and at the same ratios of assessed value to the fair and reasonable market value thereof as fixed in paragraph (b) herein, provided, however, that the legislature may vary the ratio of assessed value to the fair and reasonable market value as to any class of property as defined in paragraph (b) herein, and provided, further, that the legislature may fix a uniform ratio of assessment of all property within a county defined in paragraph (a) herein as Class II and III and may fix a different ratio of assessment for property defined in paragraph (a) as Class I. Such ratios as herein authorized may vary among counties so long as each such ratio is uniform within a county.

No class of property shall have a ratio of assessed value to

fair and reasonable market value of less than 15 per centum nor more than 35 per centum.

(d) A county, municipality, or other taxing authority may decrease any ad valorem tax rate at any time, provided such decrease shall not jeopardize the payment of any bonded indebtedness secured by such tax. When the tax assessor of each county shall complete the assembly of the assessment book for his county for the ad valorem tax year immediately following the adoption of this amendment and the computation of ad valorem taxes that will be paid upon such assessment, he shall certify to each authority within his county that levies an ad valorem tax the amount of ad valorem tax that will be produced by every levy in that year but excluding for this purpose any assessment of property added to the tax rolls of such county for the tax year in which such certification is made that was not included on the tax rolls for the next preceding tax year. If it shall appear that the estimated ad valorem tax receipts from any levy so estimated shall be less than the receipts from the same levy during the next preceding ad valorem tax year, then the levying authority shall increase each tax rate by such millage as is necessary to produce revenue that is not less than and that is substantially equal to that received during such immediately preceding tax year. It is further provided that any and all millage adjustments shall be made in increments of not less than ½ mill. The adjustment herein required shall be made only one time and shall be made in the ad valorem tax year immediately following the adoption of this amendment.

(e) Any county, municipality, or other taxing authority may increase the rate at which ad valorem taxes are levied above the limit now provided in the Constitution provided that the proposed increase shall have been (1) proposed by the authority having power to levy the tax after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a majority vote of the qualified electors of the area in which the tax is to be levied or increased who vote on the proposal.

(f) The legislature is authorized to enact legislation to im-

plement the provisions of this amendment, and may provide for exemptions from taxation; provided, however, that any statutory exemption existing prior to the adoption of this amendment shall not be repealed, except by subsequent legislative act, and shall remain in full force and effect.

(g) Wherever any constitutional provision or statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money, or incur indebtedness in relation to the assessment of property therein for state taxes or for state and county taxes such provision shall mean as assessed for county or municipal taxes as the case may be.

(h) Any provision of the Constitution of Alabama to the contrary notwithstanding, ad valorem taxes shall never exceed 1½% of the fair and reasonable market value of the property in any one taxable year.

(i) The following property shall be exempt from all ad valorem taxation: the real and personal property of the state, counties and municipalities and property devoted exclusively to religious, educational or charitable purposes.

ALA. CONSTITUTION, AMENDMENT NO. 373:

Amendment No. 373

AMENDMENT OF SECTION 217.

Sec. 217. Classification of taxable property for purposes of ad valorem taxation; taxable property to be taxed by state, counties, municipalities, etc., at same rate; assessment ratios for purposes of ad valorem taxation; increase or decrease of assessment ratios by counties, municipalities, etc.; increase or decrease of ad valorem tax rates by counties, municipalities, etc.; maximum amount of ad valorem tax; certain property to be assessed at current use value and not market value; exemption of certain property from ad valorem taxation; interpretation of authority for counties, municipalities, etc., to levy taxes, borrow money, etc., in relation to assessment of

property; counties, municipalities, etc., authorized to levy additional ad valorem tax for costs of certain state-wide reappraisal of property.

(a) On and after October 1, 1978, all taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:

Class I. All property of utilities used in the business of such utilities.

Class II. All property not otherwise classified.

Class III. All agricultural, forest and single-family owner-occupied residential property, and historic buildings and sites.

Class IV. All private passenger automobiles and motor trucks of the type commonly known as "pickups" or "pickup trucks" owned and operated by an individual for personal or private use and not for hire, rent or compensation.

(b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate. On and after October 1, 1978, such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios as assessed value to the fair and reasonable market value (except as otherwise provided in subsection (j) hereof) of such property:

Class I. 30 per centum.
Class II. 20 per centum.
Class III. 10 per centum.
Class IV. 15 per centum.

(c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authorities, all taxable property shall be forever taxed at the same rate. On and after October 1, 1978, such property shall be assessed for ad valorem tax purposes according to the classes of property defined in subsection (a) hereof and at the same ratios of assessed value to the fair and reasonable market value thereof as fixed in subsection (b) hereof, except as otherwise provided in subsection (j) hereof

and this subsection (such ratios being herein called "assessment ratios"). In connection with the ad valorem taxes that a county, municipality or other taxing authority is authorized or required to levy and collect pursuant to any provision of this Constitution, for the ad valorem tax year beginning October 1, 1978, any such taxing authority may, subject to criteria established by act of the legislature, by resolution of the governing body of that taxing authority, at any time not later than September 30, 1979, increase or decrease the assessment ratio applicable to any class of taxable property, such increase or decrease to be effective for ad valorem tax years beginning on and after October 1, 1978. If (1) a county, municipality or other taxing authority adjusts an assessment ratio pursuant to the preceding sentence and (2) the receipts from all ad valorem taxes levied by or with respect to such taxing authority during the ad valorem tax year beginning October 1, 1978, exceed by more than five percent, or are less than 95 percent of, the receipts from such ad valorem taxes for the ad valorem tax year beginning October 1, 1977, then at any time not later than September 30, 1980, for ad valorem tax years beginning on and after October 1, 1979, the taxing authority may, subject to criteria established by act of the legislature, by resolution of the governing body of that taxing authority, adjust any assessment ratio applicable to any class of taxable property. On and after October 1, 1979, the governing body of any county, municipality or other taxing authority may, subject to criteria established by act of the legislature, at any time increase or decrease the assessment ratio applicable to any class of taxable property; provided, that any proposed adjustment to an assessment ratio to be made pursuant to this sentence, whether an increase or a decrease, shall have been (1) proposed by the governing body of the taxing authority after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a majority vote of the qualified electors residing in the taxing authority who vote on the proposal at a special election called and held in accordance with the law governing special elections. No decrease in an assess-

ment ratio pursuant to this subsection (c) shall be permitted with respect to either of the ad valorem tax years beginning October 1, 1978, and October 1, 1979, if such county, municipality or other taxing authority has increased any millage rate under subsection (e) of this section with respect to such ad valorem tax year. The legislature shall enact general laws applicable to all counties, municipalities and other taxing authorities regulating and establishing criteria for the exercise of the powers granted such taxing authorities to adjust assessment ratios as hereinabove provided. Such assessment ratios as herein authorized may vary among taxing authorities so long as each such assessment ratio is uniform within a taxing authority. Any decrease in any assessment ratio pursuant to this subsection shall not jeopardize the payment of any bonded indebtedness secured by any tax levied by the taxing authority decreasing the assessment ratio. Any action authorized by this subsection to be taken by a taxing authority, or the governing body thereof, shall, other than in the case of a municipality, be taken by resolution of the governing body of the county in which such taxing authority is located acting on behalf of such taxing authority.

(d) With respect to ad valorem taxes levied by the state or by any county, municipality or other taxing authority, no class of taxable property shall have an assessment ratio of less than five per centum nor more than 35 per centum.

(e) A county, municipality or other taxing authority may decrease any ad valorem tax rate at any time, provided such decrease shall not jeopardize the payment of any bonded indebtedness secured by such tax. For the ad valorem tax year beginning October 1, 1978, when the tax assessor of each county shall complete the assembly of the assessment book for his county for that ad valorem tax year and the computation of ad valorem taxes that will be paid upon such assessment, he shall certify to each authority within his county that levies an ad valorem tax the amount of ad valorem tax that will be produced by every levy in that ad valorem tax year but excluding for this purpose any assessment of new taxable property not

previously subject to taxation (except "escaped" property as defined by law) added to the tax rolls of such county for the ad valorem tax year in which such certification is made that was not included on the tax rolls for the next preceding ad valorem tax year. Any county, municipality or other taxing authority, at any time not later than September 30, 1979, may increase the rate at which any ad valorem tax is levied by or with respect to that taxing authority above the limit otherwise provided in this Constitution, provided that the amount of the above-described certification or anticipated tax receipts with respect to such tax is less than 120 percent of the actual receipts from such tax for the ad valorem tax year beginning October 1, 1977, such increase to be effective for ad valorem tax years beginning on and after October 1, 1978; provided, that any such millage increase shall not exceed in mills the total of (i) the number of additional mills that is necessary, when added to the millage rate imposed with respect to such tax on each dollar of taxable property situated in the taxing authority for the ad valorem tax year beginning October 1, 1977, to produce revenue that is not less than and that is substantially equal to that received by the taxing authority with respect to such tax during such immediately preceding ad valorem tax year, plus (ii) a number of additional mills equal to 20 percent of the total mills imposed by that taxing authority with respect to such tax on each dollar of taxable property situated in the taxing authority for the ad valorem tax year beginning October 1, 1977. If, for the ad valorem tax year beginning October 1, 1978, the receipts from any ad valorem tax with respect to which any millage rate has been increased pursuant to the immediately preceding sentence are less than 95 percent of the receipts from such ad valorem tax for the ad valorem tax year beginning October 1, 1977, then at any time not later than September 30, 1980, the taxing authority may increase any millage rate with respect to such ad valorem tax in the manner provided in the immediately preceding sentence, such increase to be effective for ad valorem tax years beginning on and after October 1, 1979. It is further provided that all millage adjustments shall

be made in increments of not less than one tenth (1/10) mill.

(f) On and after October 1, 1979, any county, municipality or other taxing authority may at any time increase the rate at which any ad valorem tax is levied above the limit otherwise provided in this Constitution; provided, that the proposed increase to be made pursuant to this subsection shall have been (1) proposed by the governing body of the taxing authority after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a majority vote of the qualified electors residing in the taxing authority who vote on the proposal at a special election called and held in accordance with the law governing special elections. Any adjustments or other actions authorized to be made or taken pursuant to this subsection and subsection (e) hereof shall be made or taken by resolution of the governing body of such taxing authority, or if there is no such governing body and in the case of a taxing authority other than a municipality, by resolution of the governing body of the county in which such taxing authority is located acting on behalf of such taxing authority. The provisions of subsections (c), (e) and (f) of this section shall not apply to ad valorem taxes levied by the state.

(g) The legislature is authorized to enact legislation to implement the provisions of this section and may provide for exemptions from taxation; provided, that unless otherwise expressly provided, no amendment to this section shall be construed to repeal any statutory exemption existing on the effective date of any such amendment hereto.

(h) Wherever any constitutional provision or statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money or incur indebtedness in relation to the assessment of property therein for state taxes or for state and county taxes, such provision shall mean as assessed for county or municipal taxes, as the case may be.

(i) Except as otherwise provided in this Constitution, including any amendment thereto whenever adopted with respect

to taxable property located in the city of Mountain Brook, the city of Vestavia Hills, or the city of Huntsville, the amount of ad valorem taxes payable to the state and to all counties, municipalities and other taxing authorities with respect to any item of taxable property described as Class I property shall never exceed 2 percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year, such amount with respect to any item of Class II property shall never exceed 1½ percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year, such amount with respect to any item of Class IV property shall never exceed 1¼ percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year, and such amount with respect to any item of Class III property shall never exceed 1 percent of the fair and reasonable market value of such taxable property in any one ad valorem tax year. Whenever the total amount of ad valorem property taxes otherwise payable by any taxpayer with respect to any item of taxable property shall exceed in any one ad valorem tax year the maximum amount of such taxes permitted by this section, such amount of taxes shall be reduced by subtracting that amount of tax due that is in excess of the amount of tax otherwise permissible under the Constitution. In connection with the taxation of any item of taxable property, the amount of tax to be subtracted with respect to each authority levying and collecting any ad valorem property tax shall be in the same proportion to the total amount of tax to be subtracted that the total number of mills on each dollar of taxable property situated in the taxing authority levied by such taxing authority bears to the total number of mills on each dollar of taxable property situated in the taxing authority levied by all taxing authorities with respect to such item of taxable property. Before sending to any taxpayer any notice relating to the collection of ad valorem taxes, the tax collector in each county shall determine whether any portion of the amount of ad valorem property tax otherwise due with respect to any item of taxable property shall be subtracted pursuant to the provisions of this subsection and

shall apportion the amount to be subtracted in accordance with the provisions of this subsection.

(j) Notwithstanding any other provision of this section, on and after October 1, 1978, taxable property defined in subsection (a) hereof as Class III property shall, upon application by the owner of such property, be assessed at the ratio of assessed value to the current use value of such taxable property and not the fair and reasonable market value of such property. The legislature may enact laws uniformly applicable to the state and all counties, municipalities and other taxing authorities establishing criteria and procedures for the determination of the current use value of any eligible taxable property and procedures for qualifying such property for assessment at its current use value. The legislature may also enact laws uniformly applicable to the state and all counties, municipalities and other taxing authorities providing for the ad valorem taxation of any taxable property ceasing to qualify for current use valuation; provided, however, that any additional tax on taxable property ceasing to qualify for current use valuation shall not apply to more than the three ad valorem tax years immediately preceding such cessation of qualification (including as one such year the year in which cessation of qualification occurs).

(k) The following property shall be exempt from all ad valorem taxation: the real and personal property of the state, counties and municipalities and property devoted exclusively to religious, educational or charitable purposes, household and kitchen furniture, all farm tractors, all farming implements when used exclusively in connection with agricultural property and all stocks of goods, wares and merchandise.

(*l*) Notwithtanding the other provisions of this section, with respect to the costs of reappraisal incident to the state-wide reappraisal of property heretofore authorized by the legislature, each county, municipality or other taxing authority for ad valorem tax years beginning on and after October 1, 1978, may impose and levy an additional ad valorem tax of not more than two mills on all taxable property located in the taxing authority in order to reimburse itself for its payment of such costs of

reappraisal or to pay any unpaid costs or its pro rata share of such unpaid costs of reappraisal. The taxes provided for in this subsection, or any pro rata part thereof, shall terminate at the end of the ad valorem tax year in which sufficient funds are received from the taxes to pay in full the said reappraisal costs and any receipts from such taxes that are received during the ad valorem tax year of their termination that are not needed for the purposes specified herein may be used by the taxing authority levying the tax for general purposes of the taxing authority. The taxes authorized in this subsection shall not exceed in the aggregate, with respect to any item of taxable property located in the taxing authority, a total of two mills for all such taxes levied by all taxing authorities in a county and not two mills for each taxing authority in a county. If more than one such taxing authority in a county has paid or owes all or a portion of its reappraisal costs, such two mills shall be prorated among such taxing authorities in the county as they may agree, or if they cannot agree, in the percentage which each such taxing authority's costs of reappraisal bear to the total costs of reappraisal of all taxing authorities in the county. The provisions of this subsection shall apply only to the costs incurred by a taxing authority incident to the state-wide reappraisal of property heretofore authorized by the legislature, the amount of which costs shall be certified by the department of revenue, and shall not be applicable to any future reappraisals that may be required by law.

(m) If any portion of this section should be declared invalid by any court of competent jurisdiction, such invalidity shall not affect the validity of any of the remaining portions of this section, which shall continue effective.

§ 40-8-1, *CODE OF ALABAMA* (1975):

§ 40-8-1. Assessment rate.

(a) With respect to ad valorem taxes levied by the state, and, unless otherwise provided with respect to ad valorem taxes levied by a county, municipality or other taxing authority

other than the state, all taxable property shall be divided into the following classes and no other and shall be assessed for ad valorem tax purposes at the following ratios of assessed value to the fair and reasonable market value of such property:

Class I. All property of utilities used in the business of such utilities, 30 percent.

Class II. All property not otherwise classified, 25 percent.

Class III. All agricultural, forest and residential property, 15 percent.

(b) As used herein, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) ALL PROPERTY OF UTILITIES. All property assessed for taxation by the department of revenue pursuant to the provisions of chapter 21 of this title.

(2) ALL RESIDENTIAL PROPERTY. Only real property used exclusively as a single-family dwelling by the owner thereof.

(3) AGRICULTURAL and FOREST PROPERTY. All real property used for raising, harvesting and selling crops or for the feeding, breeding, management, raising, sale of or the production of livestock, to include beef cattle, sheep, swine, horses, ponies, mules, poultry, fur-bearing animals, honeybees and fish, or for dairying and the sale of dairy products, or for the growing and sale of timber and forest products, or any other agricultural or horticultural use or animal husbandry or any combination thereof.

(4) ALL PROPERTY NOT OTHERWISE CLASSIFIED. All real and personal property which does not fall within one or both Classes I and III.

(c) Wherever any statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money or incur indebtedness in relation to the assessment of property therein for state taxes or for state and county taxes, such provision shall mean as assessed for county or municipal taxes.

(d) The following property shall be exempted from ad valorem taxation: the real and personal property of the state, counties and municipalities and real and personal property devoted exclusively to religious, educational or charitable purposes, also the property of Masonic lodges, Knights of Columbus homes and union halls shall be exempt when used exclusively for the purpose and business of such organizations. All property now exempt by law shall continue to be exempt from taxation until changed by law.

(e) In the following designated counties taxable property shall be assessed at the ratio of assessed value to fair and reasonable market value for each class of property at the rate indicated:

County	Class I	Class II	Class III
Morgan	30%	20%	20%
Limestone	30%	20%	15%
Etowah	30%	20%	15%
Clay	30%	20%	15%
Cleburne	30%	20%	15%
Barbour	30%	15%	15%
Coffee	30%	15%	15%
Bullock	30%	15%	15%
Hale	30%	15%	15%
Wilcox	30%	15%	15%
Monroe	30%	15%	15%
Randolph	30%	15%	15%
Perry	30%	15%	15%
Bibb	30%	15%	15%
Houston	30%	15%	15%
Dale	30%	15%	15%
Henry	30%	15%	15%
Jefferson	30%	25%	20%
Calhoun	30%	25%	15%

(Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 17; Acts 1961, Ex. Sess., No. 153, p. 2101; Acts 1967, No. 502, p. 1215; Acts

1971, 3rd Ex. Sess., No. 166, p. 4416, § 1; Acts 1973, No. 1216, p. 2062.)

ALA. CODE § 40-8-1 (1975) (as amended 1978):

§ 40-8-1. Assessment rate.

(a) On and after October 1, 1978, with respect to ad valorem taxes levied by the state, and, unless otherwise provided, with respect to ad valorem taxes levied by a county, municipality or other taxing authority other than the state, all taxable property shall be divided into the following classes and no other and shall be assessed for ad valorem tax purposes at the following ratios of assessed value to the fair and reasonable market value of such property, or, as may be provided by law, to the current use value of such property:

Class I. All property of utilities used in the business of such utilities, 30 percent.

Class II. All property not otherwise classified, 20 percent.

Class III. All agricultural, forest and residential property, and historic buildings and sites, 10 percent.

Class IV. All private passenger automobiles and motor trucks of the type commonly known as "pickups" or "pickup trucks" owned and operated by an individual for personal or private use and not for hire, rent or compensation, 15 percent.

(b) As used herein, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) ALL PROPERTY OF UTILITIES. All property assessed for taxation by the department of revenue pursuant to the provisions of chapter 21 of this title; provided, that after September 30, 1979, and only to the extent required by Title III, § 306 of Pub. L. 94-210 (the Railroad Revitalization and Regulatory Reform Act of 1976, codified as 49 U.S.C. § 26c), "transportation property," as that term is defined in the aforesaid statute, as heretofore or hereafter amended, or in

any subsequent statute of similar import, shall not be assessed as Class I property.

(2) ALL RESIDENTIAL PROPERTY. Only real property used exclusively as a single-family dwelling by the owner thereof.

(3) AGRICULTURAL AND FOREST PROPERTY. All real property used for raising, harvesting and selling crops or for the feeding, breeding, management, raising, sale of or the production of livestock, including beef cattle, sheep, swine, horses, ponies, mules, poultry, fur-bearing animals, honeybees and fish, or for dairying and the sale of dairy products, or for the growing and sale of timber and forest products, or any other agricultural or horticultural use or animal husbandry or any combination thereof.

(4) ALL PROPERTY NOT OTHERWISE CLASSIFIED. All real and personal property which does not fall within any one or more of Classes I, III and IV.

(5) ALL PRIVATE PASSENGER AUTOMOBILES AND MOTOR TRUCKS OF THE TYPE COMMONLY KNOWN AS "PICKUPS" OR "PICKUP TRUCKS" OWNED AND OPERATED BY AN INDIVIDUAL FOR PERSONAL OR PRIVATE USE AND NOT FOR HIRE, RENT OR COMPENSATION. All private passenger automobiles, as that term is defined in sections 40-12-240, subdivision (12), and 40-12-241; and all motor trucks of the type commonly known as "pickups" or "pickup trucks," weighing not exceeding 8,000 pounds.

(6) HISTORIC BUILDINGS AND SITES. Regardless of the use to which such property is put, all buildings or structures (i) listed in the National Register of Historic Places or (ii) located in a registered historic district and certified by the United States secretary of the interior as being of historic significance to the district.

(c) Wherever any statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money or incur indebtedness in relation to the assessment of property therein for state

taxes or for state and county taxes, such provision shall mean as assessed for county or municipal taxes.

(d) The following property shall be exempted from ad valorem taxation: the real and personal property of the state, counties and municipalities and real and personal property devoted exclusively to religious, education or charitable purposes. The property of Masonic lodges, Knights of Columbus homes and union halls shall be exempt when used exclusively for the purposes and business of such organizations. All property now exempt by law shall continue to be exempt from taxation until changed by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 17; Acts 1961, Ex. Sess., No. 153, p. 2101; Acts 1967, No. 502, p. 1215; Acts 1971, 3rd Ex. Sess., No. 166, p. 4416, § 1; Acts 1973, No. 1216, p. 2062; Acts 1978, 2nd Ex. Sess., No. 46, p. 1724, § 2.)

ALA. CODE § 40-21-1 (1975):

§ 40-21-1. Department of revenue to assess all property; applicability of chapter.

It shall be the duty of the department of revenue to assess for taxation all property of all railroad companies, street and suburban railroad companies or persons or companies operating railroad or street railroads, or suburban railroads or sleeping cars in this state; all express companies, including railroad companies doing an express business and all telephone and long distance telephone and all telegraph companies, person or persons doing an express, telephone or telegraph business; all persons, firms or corporations doing a gas business, transporting gas or furnishing gas, natural, manufactured or by-product, in or through pipes or in drums, tubes, cylinders or by any other method; all water, electric light or power, hydroelectric power companies, steam heat, refrigerated air, dockage or cranage, toll roads, toll ferries, toll bridges, railroad equipment or navigation companies, pipelines for transporting or furnishing natural, manufactured or by-product gas, water, oil, gasoline or other commodities of commerce and the property of all public

service or public utility corporations, and all property not required by law to be listed for taxation with the county tax assessor; and the owner, president, general manager, agent, trustee, receiver or other person or persons having control of the company's affairs in this state shall make returns of all property of said company located in this state to the department of revenue. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 142.)

No. 85-422 (2)

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of
Civil Appeals of Alabama and the
Supreme Court of Alabama

MOTION TO DISMISS OR AFFIRM

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No. 85-422

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

MOTION TO DISMISS OR AFFIRM

May it please the Court:

Appellee, State of Alabama, pursuant to Rule 16 of the Rules of the United States Supreme Court, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Alabama on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I. THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of the validity under the Equal Protection Clause of the United States Constitution of certain provisions of the Alabama ad valorem

tax laws. Amendment 373, Constitution of Alabama 1901, provides for four classifications of property for ad valorem tax purposes, with the property of utilities being classified as Class I. Property in this class is assessed at the highest rate of assessment of 30 percent. Section 40-8-1, *Code of Alabama 1975*, provides a definition of the four classifications of property contained in Amendment 373. Section 40-8-1(b)(1) defines property of utilities to be "all property assessed for taxation by the Department of Revenue pursuant to the provisions of Chapter 21 of this title." Section 40-21-1, *Code of Alabama 1975*, states that it shall be the duty of the Department of Revenue to assess for taxation the property of various listed types of businesses, including "pipelines for transporting or furnishing natural, manufactured or by-product gas, water, oil, gasoline or other commodities of commerce." Thus, the property of oil pipelines such as Colonial is taxed at the 30% assessment rate applicable to utilities, inasmuch as oil pipelines are statutorily defined as utilities.

B. The Proceedings Below

The Alabama Department of Revenue entered an assessment against Colonial for the 1982 tax year based on its determination that Colonial constitutes a utility under Alabama law. Colonial appealed to the Circuit Court of Montgomery County, Alabama, contending that the statutory definition contained in §40-8-1 is in violation of Amendment 373 to the Constitution of Alabama of 1901, which amendment defines Class I property as "all property of utilities used in the business of such utilities," and that the classification of oil pipelines as utilities for ad valorem tax purposes violates the Equal Protection Clause of the United States Constitution. The Circuit Court (which is the trial court in Alabama) agreed with Colonial, whereupon the State appealed to the Court of Civil Appeals of Alabama,

which reversed the trial court and ruled that Alabama's taxing scheme as applied to Colonial is valid under both state and federal law. After granting Colonial's petition for a writ of certiorari to the Court of Civil Appeals and hearing oral argument, the Alabama Supreme Court quashed the writ as improvidently granted, thus allowing the opinion of the Court of Civil Appeals to stand.

II. ARGUMENT

This Case Presents No Substantial Question Not Previously Decided By This Court.

It is well-established that classifications for purposes of taxation must meet the rational basis test enunciated by this court in the case of *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1958), in which it was stated that:

> The states have a very wide discretion in the laying of their taxes. [The Equal Protection Clause] imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation . . . [The State] is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted].
>
> . . . the State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be

> that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. [Citations omitted]
>
> . . . [I]t has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it.

In *Lehnhausen v. Lake Shore Auto Parts Company*, 410 U.S. 356, 93 S. Ct. 1801, 35 L.Ed.2d 351 (1973), this Court stated that there is a presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Colonial bases its equal protection argument primarily upon the fact that motor carriers, buslines and airlines are not assessed centrally by the Department of Revenue as Class I property, while oil pipelines are so assessed. Although Colonial seeks to lump itself into the same class with buslines, bargelines, motorcarriers, etc., product pipelines are not identical to these other transportation modes and none of the others are identical to each other. It is apparent that pipelines may be separately classified from other transportation modes without violating the Equal Protection Clause, as demonstrated by the fact that the Congress has required that states treat railroads differently from other transpor-

tation property in adopting the Four R Act, 49 U.S.C. §11503, which applies only to railroads; by adopting the Motorcarrier Act, 49 U.S.C. §11503(a), which applies only to motorcarriers (trucks); and by enacting a similar act with regard to the taxation of airlines in the Tax Equity and Fiscal Responsibility Act of 1982, §532, amending 49 U.S.C. Section 1513(b) and (d), which has the effect of forbidding the state from assessing property of air-carriers at a higher rate than other commercial and industrial property. In fact, the Congress has gone so far as to authorize the FERC to regulate gas pipelines differently from the way in which it regulates oil pipelines in that gas pipelines are required to obtain a certificate of necessity and convenience before they are built, while this is not required of oil pipelines. If differentiations may be made as between different types of pipelines, it is apparent that they may be made as between separate transportation modes such as between pipelines and motorcarriers, airlines, railroads, etc. If Colonial's theory that all transportation modes must be treated equally for tax purposes is correct, then it follows that each of the foregoing federal acts are unconstitutional, since each was adopted at a different time to apply to only one transportation mode, thus according different treatment to that mode from that which is accorded to the others.

The Alabama Supreme Court found that under state law, Colonial constitutes a utility and that consequently it should be taxed as a utility. Some other transportation modes are not taxed as utilities, either because the State is forbidden by federal law from taxing them at the rate at which other utilities are taxed, or for other reasons. The State of Alabama has enacted a valid taxing scheme under which each member of a particular classification is taxed equally. Colonial complains because it is taxed at the same rate as other utilities and argues that because it is a transportation company as well as a

utility, it may not be taxed at the same rate as are other utilities because some other transportation companies are not considered to be utilities for tax purposes. The State submits that since Colonial is a utility, it may be taxed at the same rate as are other utilities without violating the Equal Protection Clause. In *New York Rapid Transit Corp. v. New York*, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024, rehearing denied 304 U.S. 588, 58 S.Ct. 939, 82 L.Ed. 1548, this Court stated that in taxing utilities as a class the legislature is not required to make meticulous adjustments for a particular subclass of utility.

This court has never held that all forms of transportation companies must be considered as belonging to the same classification for tax purposes. Only if this court so held could Colonial prevail in this case. A state may validly choose to favor one form of transportation over another, or to tax one form of transportation and not others. Were this not true, then not only would the federal statutes previously cited herein be unconstitutional, but so would the Amtrack system, subsidized city bus systems, and every other transportation company that obtains any special dispensation from the government. This Court has held that it is constitutionally valid to separately classify many kinds of corporations or companies, including particular types of transportation companies, such as railroads, *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254; *Baker v. Druesedow*, 263 U.S. 137, 44 S.Ct. 40, 68 L.Ed. 212; and express companies, *Western U.Tel. Co. v. Indiana*, 165 U.S. 304, 17 S.Ct. 345, 41 L.Ed. 725; *Pacific Exp. Co. v. Seibert*, 142 U.S. 339, 12 S.Ct. 250, 35 L.Ed. 1035. Colonial has failed to meet its burden of proving that Alabama's taxing scheme has no rational basis. Its argument presents no substantial federal question in light of the precedent concerning the burden

of one attacking a taxing scheme under the Equal Protection Clause.

Colonial has done a masterful job of attempting to paint the Alabama Supreme Court's ruling in this case with the same brush as the ruling in *Metropolitan Life Insurance Company v. Ward*, ____ U.S. ____, 105 S. Ct. 1676 (1985), and other cases dealing with discrimination by a state against foreign corporations in favor of domestic corporations. Since this case does not concern in any way the domestic versus foreign discrimination question, the cases cited by Colonial in its jurisdictional statement are only marginally applicable to the present case.

III. CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Alabama and the Alabama Court of Civil Appeals.

Respectfully submitted,

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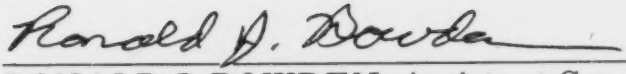

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COUNSEL FOR APPELLEE

No. 85-422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

COLONIAL PIPELINE COMPANY,
Appellant,

v

STATE OF ALABAMA,
Appellee.

PROOF OF SERVICE

I, Ronald J. Bowden, a member of the Bar of the Supreme Court of the United States and attorney of record for Appellee, State of Alabama, hereby certify that on the 8th day of October, 1985, I served copies of the foregoing Motion to Dismiss or Affirm on all parties required to be served by depositing a copy of same in the United States Mail, with first-class postage prepaid, addressed to:

N. Lee Cooper
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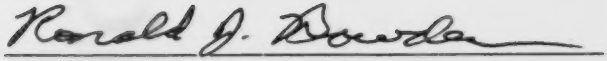

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